United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

B pls

74-1713

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-1713

In the Matter of

A Motion to Compel Arbitration

between

INTEROCEAN SHIPPING COMPANY,

Petitioner-Appellee,

—and—

NATIONAL SHIPPING AND TRADING CORPORATION and HELLENIC INTERNATIONAL SHIPPING, S.A.,

Respondents-Appellants.

BRIEF OF RESPONDENTS-APPELLANTS

HILL, BETTS & NASH
Attorneys for Respondents-Appellants
Suite 5215
One World Trade Center
New York, New York 10048
Telephone: 466-4900

ELI ELLIS
DAVID I. GILCHRIST
MARK M. JAFFE
Of Counsel

TABLE OF CONTENTS

PAGE

Authorities Cited

Cases:

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-1713

In the Matter of
A Motion to Compel Arbitration

between

INTEROCEAN SHIPPING COMPANY,

Petitioner-Appellee,

—and—

NATIONAL SHIPPING AND TRADING CORPORATION and HELLENIC INTERNATIONAL SHIPPING, S.A.,

Respondents-Appellants.

BRIEF OF RESPONDENTS-APPELLANTS

Statement

Respondents-Appellants, NATIONAL SHIPPING AND TRADING CORPORATION ("NATIONAL") and HELLENIC INTERNATIONAL SHIPPING, S.A. ("HELLENIC") appeal from an Order entered on April 11, 1973 in the Southern District of New York on the Decision of Sylvester J. Ryan (D.J.), dated February 28, 1974. The case had been remanded to the District Court for hearing on the issue of the making of an agreement to arbitrate pursuant to Section 4 of the

Federal Arbitration Act (9 U.S.C. 1 et seq.), *Interocean Shipping Company* v. *National Shipping and Trading Corporation* and *Hellenic International Shipping, S.A.*, 462 F. 2d 673 (1973). The Order granted, after summary trial, the petition of INTEROCEAN SHIPPING COMPANY ("INTEROCEAN") to compel arbitration at New York on INTEROCEAN'S claim of breach of a charter allegedly entered into on March 17, 1971 for the charter to HELLENIC of the S/T OSWEGO RELIANCE and directed both respondents to proceed in accordance with the provisions of a certain "Mobiltime" charter party arbitration clause. In its petition, INTEROCEAN claimed damages resulting from the alleged breach in the amount of $1,400,000. In the pleadings and at trial, respondents HELLENIC and NATIONAL denied the existence of a charter, and hence any duty to arbitrate. NATIONAL further denied it had ever acted in any capacity other than as disclosed agent for HELLENIC and accordingly was not bound by any agreement to arbitrate.

The Court below held:

> "The overwhelming evidence, both testimonial and documentary is that there was a charter party agreement entered into by the parties, the essential terms of which were contained in the fixture letter which bound both, and that performance by the charterer HELLENIC was guaranteed by NATIONAL, and that the guarantee was set forth in the fixture letter signed by the broker, who was the agent for both parties." (App. 38)

The Issues Presented for Review and the Errors of the Court Below

The issues presented on this appeal are:

1. Did the Court below err in finding that there was a meeting of the minds on March 17, 1971 as to each and every essential term of a charter party?

2. Did the Court err in finding that respondent NATIONAL was bound as a guarantor or surety for the performance of such alleged charter, and that the alleged "fixture" telex of March 17, was a memorandum in writing sufficient to satisfy the Statute of Frauds as to NATIONAL?

3. Did the Court below err in ordering NATIONAL, not a party to the charter, to arbitrate?

4. Did the Court below commit prejudicial evidentiary errors requiring reversal?

Respondents appeal on the grounds that the findings and conclusions of the Court below on the issue of the existence of a charter and agreement to arbitrate were "clearly erroneous" within the meaning of Rule 52 of the Federal Rules of Civil Procedure.[1] Respondent NATIONAL further contends the holding that it was bound as a guarantor or surety for the performance of the alleged charter and, in such capacity was a proper party whom the Court could direct to arbitrate is erroneous as a matter of law.

The record demonstrates that, contrary to the holding of the Court below, INTEROCEAN failed to sustain its burden

---

[1] This appeal is taken pursuant to Section 1291 of Title 28 U.S.C. providing for review of final decisions of the district courts. An order compelling arbitration is a final order appealable under Section 1291. *Interocean, supra* at 675.

of proof and that essential details had not been agreed to on March 17. The charter negotiations in fact continued until March 24, when respondents withdrew, and at all times were subject to agreement as to the details of the printed "Mobiltime" charter party form, a limitation inexplicably omitted by the broker from the alleged "fixture" telex. Specifically, the parties never reached agreement as to: 1) the guarantee required by INTEROCEAN, 2) drydocking, 3) the trading limits and delivery range of the vessel, 4) the warranty of speed and performance and the penalty for underperformance, and 5) Protection and Indemnity Insurance including protection against liability for oil pollution, as well as other material terms of the charter.

Further, by reason of INTEROCEAN's failure to disclose at any time during the negotiations that it was a 'self-insurer", i.e. uninsured, and not entered with a Protection and Indemnity Club ("P & I Club")[2] as provided in the "Mobiltime" charter party form and that the OSWEGO RELIANCE, although nominally of Liberian registry, was manned by Nationalist Chinese officers and crew and could not trade with any Communist controlled country, there was material and mutual mistake of fact as to the vessel's insurance and the trading limits, both essential terms.

In the absence of a meeting of the minds on so many essential terms of a charter, the findings and conclusions of the Court below were, therefore, contrary to the weight of evidence and erroneous in law. INTEROCEAN failed to prove that each and every essential term of a one year and complex, $3,500,000 charter had been agreed to by telephone

[2] "Clubs" are insurance and maritime industry terms for protection and indemnity associations.

in the space of a bare forty five minutes late one afternoon, in circumstances where the parties never had any direct communication with one another and all negotiations were through a broker anxious to earn a substantial commission.

Facts

INTEROCEAN alleges that HELLENIC and NATIONAL entered into an agreement to charter the Liberian oil-ore carrier, the Steam Tanker OSWEGO RELIANCE for a "period of one year plus or minus thirty (30) days" pursuant to the terms of a certain modified "Mobiltime" printed form of charter party. INTEROCEAN relies principally on a telex, prepared and passed to the parties on March 17, 1971 by one Francis DeSalvo ("DeSalvo") of Poten & Partners, Inc. ("Poten"), New York chartering brokers.

The alleged "fixture" telex purports to have "fixed" the OSWEGO RELIANCE between INTEROCEAN as owner, and HELLENIC, allegedly a subsidiary of NATIONAL, as charterer, with an "appropriate letter of guaranty" and refers to a "Mobiltime" charter party form "excluding clauses 9, 12 (a)(ii), 12(b)(ii) and 12(b)(iii) and subject to a suitable drydock clause to be worked out for November drydock-about fifteen (15) days with proper notices."

INTEROCEAN is a Liberian subsidiary of the Bethlehem Steel Corporation and the owner of the OSWEGO RELIANCE.

HELLENIC is a Panamanian corporation engaged in the tanker trade as a time charterer of vessels and is a subsidiary of Hellenic Shipping and Industries Company Ltd. of Piraeus Greece (Tr. 238). The principal stockholder of Hellenic Shipping and Industries Company Ltd. is John Theodoracopulos. Respondent NATIONAL is a New York

corporation which functions as an operating agent for various tanker owners and charterers. The President of NATIONAL is Thomas A. Spears ("Spears"). The stock of NATIONAL is held in trust for the benefit of Harry Theodoracopulos, ("Theodoracopulos") a Vice President of NATIONAL.

At approximately 4 P.M. on Wednesday, March 17, 1971, INTEROCEAN through DeSalvo of Poten, offered the OSWEGO RELIANCE to NATIONAL, acting as agent on behalf of a prospective charterer for time charter for a period of one-year plus or minus fifteen (15) days. The offer, which followed a luncheon meeting and several telephone calls between DeSalvo and Theodoracopulos, was for reply by 4:55 P.M., local time, March 17, and was transmitted by telephone from A. J. Germano ("Germano") of Steamship Service ("Steamship"), another subsidiary of Bethlehem, to DeSalvo. The terms of the offer, according to DeSalvo's notes of the negotiations, were as follows:

> "The OSWEGO RELIANCE, an ore-oil carrier, 49,283 deadweight, 39'-5⅞" draft, 16.5 knots on 100 tons bunker C per day, cubic capacity of 1,968,842 cubic feet at 98%.
>
> Crude and/or dirty petroleum products maximum three grades within natural segregations; maintain heat 135; coiled wing tanks only; delivery one safe port Persian Gulf excluding Fao and Abadan at charterer's option. Lay days March 31/April 15 ETA April 1st; redelivery one safe Persian Gulf port at owner's option; trading world-wide *within Institute Warranty's Limits excluding China, North Viet Nam, North Korea, Cuba, Israel, and all other Communist countries;* overtime and petties $750.00 per month; rate $5.75 per deadweight ton per month; suitable drydock clause scheduled for November, 15 days; *mobiltime sub-details"* (App. 61) (Emphasis supplied).

The offer called for the payment by INTEROCEAN of brokerage commissions of 1¼% of the charter hire each to Poten and to Steamship.

According to DeSalvo's notes, the offer was passed to Theodoracopulos who identified the prospective charterer as HELLENIC, allegedly a subsidiary of NATIONAL, and countered for a review of performance every six months, a charter term of one year plus or minus 30 days; overtime and petties of $500.00 per month; hire of $5.50 per deadweight ton per month, and for a suitable drydock clause to be worked out.

DeSalvo passed Hellenic's counterproposal by telephone to Germano sometime between 4:00 P.M. and 4:30 P.M. on March 17. After an exchange of offers and counteroffers as to the hire and overtime, Germano countered at $5.60 for charter hire and $750.00 for overtime and petties, and advised DeSalvo that INTEROCEAN "wanted some guarantee who Helenic Shipping and Trading was." (Tr. 30)

DeSalvo passed this counter by telephone to Theodoracopulos who agreed to the rate and allowance for overtime and petties and when advised of the request for a guarantee replied, according to DeSalvo, that "appropriate guarantees could be given" (Tr. 30).

Next to the figures $5.60 and $750.00 which DeSalvo recorded in his notes to show agreement as to these terms, DeSalvo recorded the phrase "S/ New York Ltr. of Guarantee", meaning the "fixture" was subject to the giving of such letter of guarantee. (App. 61).

The last telephone conversation with Theodoracopulos on March 17 occurred at approximately 4:45 P.M.

DeSalvo then prepared a purported "fixture" telex which was sent that evening on Poten's telex machine to both parties. The full text of the telex sent to National is as follows:

"THEOTRAN NY
POTEN AND PARTNERS INC. MAR 17 1971
ATTEN:
MR. H. THEODORACOPULOS

CONFIRM HAVING FIXED FOR YOUR ACCOUNT TODAY AS FOLLOWS·
OWNER: INTEROCEAN SHIPPING COMPANY
CHARTERER: HELLENIC INTERNATIONAL SHIPPING S.A. OF PANAMA SUBSIDIARY OF NATIONAL SHIPPING AND TRADING WITH APPROPRIATE LETTER OF GUARANTEE.
"OSWEGO RELIANCE"
49,283 DWT 39 FT 5/8 INCHES DRAFT CUBIC 98 PERCENT 1,968,842
3 PUMPS 1300 TWPH EACH
16.5 KNOTS ON 100 BUNKER C PER DAY
DELIVERY/REDELIVERY PG EXCLUDING FAO AND ABADAN
LAYCAN MARCH 31/APRIL 15 1971 ETA APRIL 1, 1971
CRUDE AND/OR DPP MAX 3 GRADES WITHIN NATURAL SEGREGATIONS MAINTAINING HEATING 135 DEG F
COILED WING TANKS ONLY
TRADING WORLDWIDE *WITHIN IWL EXCLUDING COMMUNIST COMMUNIST CONTROLLED CHINA, NORTH VIETNAM, NOR KOREA CUBA*
PERIOD ONE YEAR PLUS OR MINUS 30 DAYS
MOBILTIME EXCLUDING CLAUSES 9, 12A11, 12B11 12B111
SUITABLE DRYDOCK CLAUSE TO BE WORKED OUT FOR NOVEMBER DRYDOCKING
ABOUT 15 DAYS WITH PROPER NOTICES

PERFORMANCE REVIEW EVERY SIX MONTHS
OVERTIME AND PETTIES $7.50 PER MONTH
RATE $5.60 PER DWT PER MO PAYABLE U S
DOLLARS IN NEW YORK
THANK YOU FOR THE OPPORTUNITY TO CONCLUDE THIS BUSINESS." (App. 42-3) (Emphasis Supplied)

An identical telex was sent to Steamship for INTEROCEAN except that such telex contained provisions for the payment of a brokerage to Poten and Steamship. (App. 63)

The terms contained in the alleged "fixture" telex differed from those in DeSalvo's notes in material respects. First, the words "Mobiltime sub-details" were not included in the telex, although they were contained in DeSalvo's notes and he testified that these words had been read over the telephone to both Theodoracopulos and Germano prior to dispatch of the telex. DeSalvo could not, however, account at the trial for the omission of this phrase (Tr. 111). Second, whereas in his notes of INTEROCEAN's offer on March 17, DeSalvo had recorded "trading world-wide within Institute's Warranty Limits excluding China, North Vietnam, North Korea, Cuba, Israel and all other Communist countries", the telex read "TRADING WORLDWIDE WITHIN IWL EXCLUDING COMMUNIST COMMUNIST CONTROLLED CHINA, NORTH VIETNAM, NORTH KOREA, CUBA." The exclusion of "Israel and all other Communist countries" was not shown on the telex, although DeSalvo was later to incorporate an exclusion of "all Communist territories," but omitting Israel, in the *pro forma* copy of the proposed charter (App. 13).

In addition, whereas at the top of the section of his notes recording Hellenic's counteroffer on March 17, DeSalvo had identified the charterer as "Hellenic International Ship-

ping, S.A., of Panama, sub National Shipping" and some eleven lines later as his last entry on the 17th had written "S/NY ltr. of guarantee," meaning subject to a guarantee. DeSalvo did not preserve that separation of the terms in the telex which read: "CHARTERER: HELLENIC INTERNATIONAL SHIPPING, S.A., OF PANAMA, SUBSIDIARY OF NATIONAL SHIPPING AND TRADING WITH APPROPRIATE LETTER OF GUARANTEE." (App. 61)

The telex was received by National at 5:36 P.M. on March 17 (Tr. 217), was taken from National's telex machine by an employee, time stamped and then given to National's president, Spears, who in turn brought it to the attention of Theodoracopulos shortly before 6:00 P.M. (Tr. 217-18, 250).

Spears, who had been aware of the negotiations, inquired of Theodoracopulos whether he had "concluded the ship" and Theodoracopulos replied that he had not (Tr. 218). Spears pointed out to Theodoracopulos the erroneous statement that HELLENIC was a subsidiary of NATIONAL and asked whether "APPROPRIATE LETTER OF GUARANTEE" meant that a letter of guarantee was to be given by NATIONAL as NATIONAL'S accountants had specifically cautioned them against the giving of such guarantees (Tr. 251). Spears also asked Theodoracopulos what the deletions to the "Mobiltime" form shown on the telex meant. Theodoracopulos did not know and advised Spears that while he had agreed to certain terms of the charter, such as the rate, period and lay days, otherwise "we [are] subject details" (Tr. 218). Due to the late hour, no one was available at NATIONAL who could operate the telex machine; so, to protest the prematurity of Poten's telex, Theodoracopulos attempted to telephone DeSalvo, but there was no answer at the Poten Office (Tr. 218, 252).

The following morning, Thursday, March 18, Theodoracopulos telephoned DeSalvo and advised him that he (DeSalvo) had been presumptuous in sending out the purported "fixture" telex, that the telex ". . . had a lot of inaccuracies in it and we had still to discuss all other matters of the charter party", that the parties were "subject to details [and] all of the rest of the terms to be discussed", and that HELLENIC was not a subsidiary of NATIONAL. Theodoracopulos also told DeSalvo that he did not understand the deletions in the "Mobiltime" form and that he wanted DeSalvo to prepare a *pro forma* of the charter party and to send it along with what INTEROCEAN wanted in the way of a guarantee so that Theodoracopulos could review them. DeSalvo replied that he would prepare a *pro forma* or "working" copy of the proposed charter party setting forth the details as well as the guarantee desired by INTEROCEAN and would send them over for Theodoracopulos' consideration (Tr. 218-220).

On March 18, DeSalvo also first advised Theodoracopulos that INTEROCEAN would insist on a dry-docking clause requiring HELLENIC to guarantee in advance that it would place the vessel in position in November, to dry-dock either in Spain, Portugal or Japan due to INTEROCEAN's arrangements with shipyards in those countries. Theodoracopulos responded that not only was dry-docking in November, during the winter season, bad enough but that to require HELLENIC to agree some eight months before the scheduled dry-docking to place the vessel either in the Iberian Peninsula or Japan at the required time was commercially unpalatable and that under no circumstances would HELLENIC accept such a clause (Tr. 221-23).

At approximately noon on March 18, DeSalvo advised Theodoracopulos of the possible interest of the Chevron Oil Company in a vessel of the size of the OSWEGO RELIANCE

for a voyage from the Persian Gulf to Durban, South Africa. Later in the day, DeSalvo informed Theodoracopulos that Chevron had inquired as to whether the vessel was enrolled in TOVALOP as Chevron would not charter a vessel which was not so enrolled.[3]

DeSalvo did not know whether the vessel was so entered and Theodoracopulos requested him to make sure that the vessel was. DeSalvo, then contacted Germano on the afternoon of the 18th, and learned for the first time that not only was the vessel not entered in TOVALOP, but that INTEROCEAN was a "self-insurer" (Tr. 148).

---

[3] "The Tanker Owner's Voluntary Agreement concerning Oil Pollution (TOVALOP) is a scheme initiated by the major Oil Companies. It takes effect as an Agreement between participating tanker Owners to reimburse National Governments for expenses reasonably incurred by them to prevent or clean-up pollution of coast lines as a result of the negligent discharge of oil from a participating tanker, but subject to a maximum of $100 per g.r.t. or $10 million, whichever is the less. *Under the Agreement a participating Owner is bound to establish and maintain his financial capability to fulfill his obligations under the Agreement.* TOVALOP also contains provisions to encourage a participating Owner to take reasonable measures to prevent potential damage by pollution and to mitigate damage by pollution from a discharge of oil. *The Clubs have made arrangements whereby a member who has signed this Agreement can be covered for his liabilities thereunder by his own Club. This is of particular importance since most oil Companies will not charter a tanker unless the Owner is a party to* TOVALOP." (Emphasis added.) ***Oil Pollution, Supplement to Handy Book for Shipowners & Masters,*** M. R. Holman, London (1971). (App. 68) As a condition of membership in Tovalop, a participating tanker owner must insure his obligations under the Tovalop Agreement (Article II(C)) normally through entry in the International Tanker Indemnity Association Limited, a mutual protection and indemnity association formed in conjunction with Tovalop (*Tovalop*, Richards, Butler & Co., London (1968)) (App. 73), or by arrangement with other P & I clubs offering equivalent coverage. "A short cruise on the good ships TOVALOP AND CRISTAL," *Journal of Maritime Law and Commerce*, Vol. 5, July 4, 1974, 609, 612.

On Friday, March 19, DeSalvo informed Theodoracopulos that INTEROCEAN was not willing to enter the vessel in TOVALOP because INTEROCEAN would have to enter its entire fleet. (DeSalvo *did not,* however, advise Theodoracopulos that INTEROCEAN was a "self-insurer" and had no P&I entry at all.)[4] Theodoracopulos replied that HELLENIC could not take the vessel without TOVALOP. But after consulting with Germano, DeSalvo did advise that the question was beyond the authority of the personnel responsible for chartering and the matter would be taken up on higher levels of the Company and in London so that a reply as to whether INTEROCEAN would enroll the vessel in TOVALOP would not be forthcoming until Monday, March 22, or Tuesday, the 23rd (Tr. 225-26).

DeSalvo did not get INTEROCEAN's proposed drydocking clause from Germano until just before the close of business on Friday, March 19. Accordingly, the "working" or *pro forma* copy of the proposed charter party was not received in the mail at the offices of NATIONAL until the following Monday morning, March 22.

Upon receipt of the *pro forma,* Theodoracopulos gave it a cursory review . . . "because we were still apart on two major details which it looked to be almost impossible to solve." However, he did note a number of objections in the margin and passed these on to DeSalvo (Tr. 227, App. 61).

Specifically, Theodoracopulos objected to the delivery range and requested that the Red Sea be included. He

---

[4] The lack of a P & I entry for the OSWEGO RELIANCE was not disclosed to respondents either prior to the alleged "fixture" telex of March 17, or in any of the exchanges which followed.

also objected to the exclusion of all Communist countries from the vessel's trading range. The alleged "fixture" telex had not shown such exclusions, and he proposed Yugoslavia, Poland, Rumania and East Germany as permissible trading points where other Liberian flags normally did call (Tr. 227).[5] DeSalvo recorded such objections in his notes. Theodoracopulos also objected to the provision that the hire be paid monthly and countered that the hire be paid semi-monthly. Several other points were also raised. Theodoracopulos next reviewed the owner's proposed drydocking clause which had been added to the printed clause of the "Mobiltime" form as follows:

> "Vessel requires drydocking November 1971. It is the intention of the owners to drydock the vessel in Portugal, Spain or Japan, and charterer guarantees to place vessel in position to drydock it in any one of those countries." (App. 15)

He reiterated to DeSalvo that this was totally unacceptable to HELLENIC (Tr. 228, App. 61), and DeSalvo replied that he was pessimistic as *"this* [the dry-docking clause] *may kill the business because these people* [INTEROCEAN] *must have it"* (Tr. 228) (emphasis added).

The following day, Tuesday, March 23, DeSalvo, after conferring with Germano, called Theodoracopulos and advised him that INTEROCEAN had decided to enter its fleet in TOVALOP but that HELLENIC would have to pay the premium for the OSWEGO RELIANCE. Theodoracopulos replied that this was absolutely an item for the owners and that

---

[5] At no time prior to the withdrawal of HELLENIC from negotiations on March 24, and until after the petition herein was filed, was it disclosed by INTEROCEAN that the OSWEGO RELIANCE had a Nationalist Chinese crew and could not call at *any* Communist country.

INTEROCEAN would have to bear such cost (Tr. 228-29). DeSalvo also advised Theodoracopulos that INTEROCEAN would agree to add the Red Sea to the vessel's delivery range provided there was no extra deviation but that INTEROCEAN would not agree to trading limits which would include "Yugoslavia, etc.," as required by HELLENIC (Tr. 27, App. 61, bottom p. 2).

The *pro forma* charter proposed by INTEROCEAN further contained the following additions and/or deletions, of economic importance, not theretofore specified in the alleged "fixture" telex, or agreed to, let alone even discussed with respondents.

(a) In Clause 1(a) the vessel's draft for purposes of the speed and fuel consumption, warranty was altered. " . . . when fully loaded to summer freeboard" was unilaterally and arbitrarily deleted and the language " . . . average speed loaded and light in moderate weather (maximum Beaufort #5) . . . " added instead.

(b) In both Clauses 1(a) and 2(a) of the *pro forma,* "moderate weather" for purposes of the vessel's speed and fuel consumption warranties was unilaterally and arbitrarily specified at maximum Beaufort #5.

(c) In Clause 2(d) of the *pro forma,* a ceiling of $0.25 per deadweight was unilaterally and arbitrarily placed on the amount by which the hire would be reduced during each calendar month for each knot, or part thereof, of the vessel's performance below her guaranteed average speed.

(d) With regard to insurance, Clause 23 of the "Mobiltime" form, the P & I Insurance warranty, was stricken in its entirety although no such deletion appeared on the alleged "fixture" telex, and Clause 12(a) of the printed charter party form, which had not been deleted, required the owner to pay for all Protection and Indemnity, hull, and other insurance on the vessel (App. 15, 16).

(e) Although not shown as excluded on the alleged "fixture" telex Clause 24(ii) was also deleted. That clause provided for the liability of the owner in the event of any admixture, leakage, contamination or deterioration of cargo through "error or fault of the servants of Owner in the loading, care or discharge of cargo."

In Clause 35 of the *pro forma,* NATIONAL was listed as the charterer's agent. There was no mention in that clause or anywhere else in the *pro forma* of a guarantee to be given by NATIONAL or anyone else.

At approximately noon on March 23, Theodoracopulos departed for vacation, after briefing Spears on the status of the negotiations (Tr. 229). During the afternoon of the 23rd, there were at least four or five telephone calls between Spears and DeSalvo and DeSalvo and Germano, not only on the TOVALOP question but on other questions, including drydocking. During the afternoon DeSalvo advised Germano that it is *"my feeling that we would have difficulty getting charter party together if owners continued to insist that the cost of TOVALOP would be for charterers account"* (App. 65, p. 41) (emphasis added).

With respect to the dry-docking clause proposed by INTEROCEAN, Spears also advised DeSalvo on the afternoon of the 23rd that, although HELLENIC wished to cooperate with INTEROCEAN, HELLENIC was unwilling to guarantee in advance to position the ship in November at the specific places which INTEROCEAN was insisting upon (Tr. 259). Later the same afternoon, DeSalvo called and asked Spears to give him the wording HELLENIC desired for the dry-docking clause. After a short interval, Spears called back and gave DeSalvo wording Spears thought HELLENIC "could

live with" to be passed on to INTEROCEAN for their reply (Tr. 263). DeSalvo's notes reflect the following:

> "Charterer will do all possible to position the vessel for 15 days in the U.K., Med. or Far East so that drydocking can be accomplished between October 15/ December 15, 1971." (App. 61)

Spears waited in his office that evening for DeSalvo's call as to INTEROCEAN's reply. DeSalvo, however, did not call back and on the following morning, Wednesday, March 24, after discussing the matter with his principals, Spears called DeSalvo and asked him whether he had yet conveyed HELLENIC's counterproposal for dry-docking to INTEROCEAN and whether INTEROCEAN had accepted it. DeSalvo told Spears that he had not done so, and Spears then instructed him as follows: "Do not. I instruct you to advise the owners that we are finished. We don't have a deal. We never had a deal and it is too late now. It is much too late." (Tr. 265).

Later in the morning of March 24, DeSalvo called and informed Spears that INTEROCEAN would agree to pay the insurance premium for TOVALOP and would accept HELLENIC's proposed "drydocking clause." Spears rejected INTEROCEAN's belated attempt at concession and reiterated that HELLENIC had terminated the negotiations. At 11:30 A.M. (as shown by Poten's received notation) Spears had a telex sent to DeSalvo for transmission to INTEROCEAN confirming HELLENIC's earlier withdrawal in the absence of an agreement as to necessary details of the charter and rejecting the attempt at belated concession. (App. 19, Tr. 265-66).

At approximately 4:00 P.M. on March 24, a telex from Poten was received at NATIONAL's offices quoting a message from INTEROCEAN stating in part:

"... WE DISAGREE THAT THERE WAS NO MEETING OF THE MINDS RATHER AS IS NORMAL PRACTICE WE WERE ATTEMPTING TO ARRIVE AT MUTUALLY SATISFACTORY LANGUAGE FOR TWO RELATIVELY MINOR POINTS. AS YOU KNOW THE ITEM WHICH CAUSED THE MOST DELAY WAS TOVALOP. TOVALOP WAS SUBJECT THAT CAME UP A DAY OR TWO AFTER THE FIXTURE. THIS FIXTURE AS INDICATED IN YOUR TELEX CONFIRMATION OF MARCH 17 WAS FIXED ON THE BASIS OF MOBILTIME WHICH MAKES NO MENTION OF TOVALOP. AFTER YOU ADVISED THAT CHARTERERS WOULD HAVE DIFFICULTY WITHOUT TOVALOP, WE, IN THE SPIRIT OF COOPERATION—REGISTERED THE OSWEGO RELIANCE AND THE BALANCE OF OUR ORE/OIL FLEET IN TOVALOP FOR A PERIOD OF FIVE YEARS. WE ASSUMED THAT THE CHARTERER WOULD AT LEAST BEAR THE ONE YEAR TOVALOP COST OF THE OSWEGO RELIANCE AT NO TIME WAS ANY LIMITATION PUT ON OUR EXCHANGES AND WE BELIEVE DISCUSSIONS PROCEEDED BETTER THAN NORMALLY FOR A CHARTER OF THIS DURATION. . . . AS WE ADVISED VERBALLY, YOU MAY ADD TO THE MOBILTIME DRYDOCKING CLAUSE THE ADDITION PROPOSED BY CHARTERER ON MARCH 22 AND WE AGREE TO PAY COST OF TOVALOP. FURTHER, YOU MAY ADD THE RED SEA AS A DELIVERY RANGE AS PER CHARTERERS EXPRESSED DESIRE ON MARCH 23 AND OUR AGREEMENT ON THAT DATE....

INTEROCEAN SHIPPING COMPANY" (App. 21)

On March 25, NATIONAL, on behalf of HELLENIC, sent a telex reply to Poten for INTEROCEAN rejecting in pertinent

part INTEROCEAN's claim that items not agreed to were "minor":

> "INTEROCEAN ADMITS THAT THERE REMAIN POINTS WHICH WERE NOT AGREED UPON BY THE PARTIES. HELLENIC INTERNATIONAL DID NOT CONSIDER THESE POINTS MINOR. HELLENIC INTERNATIONAL CONSIDERED THESE OUTSTANDING POINTS AS INTEGRAL PARTS OF A PROPOSED AGREEMENT TO WHICH BOTH PARTIES MUST MUTUALLY AGREE IN ORDER TO HAVE A CONTRACT.
>
> THE SUBSEQUENT ATTEMPTS OF INTEROCEAN TO REVIVE THE NEGOTIATIONS BY OFFERING BELATED UNILATERAL AGREEMENT TO CERTAIN OF THE OUTSTANDING POINTS CERTAINLY ARE NOT CONTRACTUALLY EFFECTIVE. . . ." (App. 22).

On March 24, after the withdrawal of HELLENIC from negotiations, INTEROCEAN instructed DeSalvo to prepare a charter party form for execution by INTEROCEAN. The form was executed by INTEROCEAN on March 25, and then tendered through DeSalvo to NATIONAL. That form differed in the following material respects from the *pro forma* received by NATIONAL on March 22.

(a) Where the *pro forma* provided in Clause 3(a) for delivery of the vessel at "a Persian Gulf Port excluding Fao and Abadan," INTEROCEAN in form which it executed had added the words "or Red Sea at Charterer's option provided no extra deviation involved."

(b) In Clause 11 the dry-docking provision originally proposed by INTEROCEAN in the *pro forma* requiring the vessel to be dry-docked in Japan, Portugal or Spain, was deleted and the following clause substituted therefore:

"Vessel requires drydocking fourth quarter 1971 for approximately 15 days. Charterers will give owners as much advance notice as possible so as to position vessel in order to coordinate drydocking during this period."

(c) In the version executed by INTEROCEAN, a further clause No. 38 was added:

"It is hereby agreed that the owner will register the vessel with tanker owners voluntary agreement concerning liability for oil pollution (Tovalop) with all costs pertaining to such to be for owners' account."

Although DeSalvo prepared a proposed form of guarantee, which he submitted to Germano for review, the form did not call for the guarantee of NATIONAL but rather of Harry Theodoracopulos personally, and it was never sent to NATIONAL or to Theodoracopulos.

Both the *pro forma* copy of the charter and the version signed by INTEROCEAN contained no reference whatsoever to a guarantee and NATIONAL was described therein only as the agent of HELLENIC (App. 11-18, 74 p. D 2-D. 8).

Respondents submit that on the totality of these facts, each documented and uncontradicted in the record, there never was any charter upon which the parties had agreed and hence, the findings and conclusions of the Court below are clearly erroneous.

ARGUMENT

POINT I

The District Court's findings and conclusion that a meeting of the minds had been reached on all essential terms of the purported charter was clearly erroneous and against the weight of evidence and should be reversed.

INTEROCEAN's burden was to establish at trial by a preponderance of admissible evidence that, "there had been a meeting of the minds as to all essential terms of a charter party on March 17," *Interocean Shipping Co.* v. *National Shipping and Trading Corp. supra* at 676. INTEROCEAN was required to prove that the alleged "fixture" telex of March 17, memoralized a true meeting of the minds of the parties as to each and every essential term of a concluded and agreed to charter between INTEROCEAN and HELLENIC. INTEROCEAN was also required to prove that NATIONAL was also a party to the alleged charter and hence any agreement to arbitrate. Such was the burden laid down for INTEROCEAN by this Court, and pleaded by INTEROCEAN at Paragraph Fifth of its petition and reiterated by its counsel at trial.

It is abundantly clear from the record that despite the holding of the Court below that the alleged "fixture" telex of March 17, signified the conclusion of negotiations and resulted in a binding agreement between the parties, the negotiations actually continued until March 24, when they were terminated by respondents. Neither on March 17, or thereafter was there ever the requisite meeting of the minds as to each and every essential term of the charter so as to give rise to a written agreement to arbitrate within the meaning of §4 of the Arbitration Act.

To conclude that reversible error was committed, this Court need only find one of the terms which remained to be agreed upon to be an essential term of the charter. Where, as in the instant case, a significant part of the evidence, including the documents relied upon by INTEROCEAN, is contained in written material, "this Court, on review, is in as good a position as the Trial Court to examine, interpret and draw inferences [therefrom]" *Gemini Navigation, Inc.* v. *Philipp Brothers,* No. 962 September Term 1973 (decided July 1, 1974), citing *J. Gerber & Co.* v. *SS Sabine Howaldt,* 437 F.2d 580, 586 (2 Cir. 1971); accord, *Severi* v. *Seneca Coal & Iron Corp.,* 381 F.2d 482, 488 (2 Cir. 1967). Moreover, the clearly erroneous standard does not shield findings in the nature of mixed conclusions of fact and law such as the Court's findings here nor does it bar from the scrutiny of this Court fact findings which are "not a finding of fact but an interpretation of the legal meaning of facts", *Lago Oil & Transport* v. *United States,* 218 F.2d 631, 634 (2 Cir. 1955). Such findings and the conclusions based thereon are as "freely reviewable as any 'conclusion of law' strictly so-called" *Barbarino* v. *Stanhope SS Co.,* 151 F.2d 553 (2 Cir. 1945); *The C. W. Patterson,* 70 F.2d 712 (2 Cir. 1934); *Ford Motor Co.* v. *Manhattan Lighterage Corporation,* 97 F.2d 577 (2 Cir. 1938); *The Ira S. Bushey, Inc.,* 120 F.2d 1010 (2 Cir. 1941)."

A. *There was no agreement as to drydocking.*

It was INTEROCEAN's contention throughout the proceedings had in this case including the prior appeal before this Court as well as at trial, *not* that the terms of the drydocking clause were ever finally agreed between the parties but rather that the drydocking clause was a minor item not essential to the alleged "fixture."

As to dry-docking the Trial Court found:

> "The fact that the fixture letter had left the drydocking clause to be worked out does not mean that the parties had not reached a meeting of the minds on this charter.
>
> The testimony of both sides on this point makes it clear that both considered this a point subject to acceptable solution at the proper time. In fact, it was the owner who wanted to reach a firm decision on the detail of the drydocking and who suggested the languange which was eventually negotiated, and not HELLENIC.
>
> * * *
>
> I conclude that the drydocking clause was firmly agreed upon by the fixture; that it was to the owner's interest to settle it at the time; that, as far as respondent was concerned, he was perfectly content to leave the details to be worked out at a later time depending upon where the vessel was; that this was performance which was not to take place for 8 months but that the essential terms of the performance had been agreed upon leaving for the future only more precise terms." (App. 57).

It was, as the Court states, the owner INTEROCEAN, who required a firm decision at the outset on the question of dry-docking, namely, a guarantee of the vessel's position for November dry-docking. The Court's finding, however, that it was the owners' language which was eventually negotiated and not HELLENIC's, is plainly incorrect. Theodoracopulos, on behalf of HELLENIC emphatically rejected INTEROCEAN's proposed dry-docking clause, a fact confirmed by DeSalvo's contemporaneous notes of the negotiations. The Court's findings that there was no objection on the part of HELLENIC to accept INTEROCEAN's proposed dry-docking clause (App. 55) is simply erroneous. In fact, if HELLENIC had not rejected INTEROCEAN's clause there would have been no need for DeSalvo to have requested from Spears on March 23, HELLENIC's proposed counter for the dry-docking terms.

The language which appeared in the form of charter executed by INTEROCEAN on March 25, 1971 was, in substance, the same language, according to DeSalvo's notes, which Spears gave to him on the afternoon of March 23 and which was not passed to INTEROCEAN until after HELLENIC withdrew from all negotiations. It was not until March 24, and after such withdrawal that INTEROCEAN instructed DeSalvo to prepare a form of charter containing the language proposed by Spears.

Close examination of the negotiations as to dry-docking, shows that contrary to the Court's finding, no agreement as to a "suitable drydocking clause" was ever reached prior to the withdrawal of HELLENIC. It is also thoroughly evident from the conduct of the parties and the very nature of the special dry-docking terms required by INTEROCEAN that, whatever the experience of DeSalvo and petitioner's "experts" in other cases, the matter of dry-docking in these negotiations was a very major item.

The alleged "fixture" telex contains the following language as to dry-docking:

> "SUITABLE DRYDOCK CLAUSE TO BE WORKED OUT FOR NOVEMBER DRYDOCKING ABOUT 15 DAYS WITH PROPER NOTICES".

The standard dry-docking clause contained at 11(a) in the printed Mobiltime Form provides:

> "The Owner at its expense shall drydock, clean and paint Vessel's bottom and make all overhaul and other necessary repairs at approximately twelve (12) month intervals, for which purpose charterer shall allow Vessel to proceed to an appropriate port." (App. 15)

Under Clause 11(a), where there is no addition to the printed language, the charterer would advise the owner

where the vessel was trading and when she would be available to dry-dock. If, however, it had been the intention of the parties here to have merely employed this clause, and to have left any commitment on their part as to the place of dry-docking to some future time, as found by the Court below, it would not have been necessary for INTEROCEAN to even have had DeSalvo set out any reservation as to dry-docking in the alleged "fixture" telex. But because of INTEROCEAN's particular requirements for dry-docking the OSWEGO RELIANCE, namely that the vessel required dry-docking at a certain time and only in certain places, it insisted upon a special addition to the standard "Mobiltime" dry-docking clause, nominating the month of dry-docking ("November"), the length of dry-docking ("about 15 days") with a reservation in the "fixture" telex as to the remainder of the dry-docking terms ("SUITABLE DRYDOCK CLAUSE TO BE WORKED OUT"). That special clause, which was not received by DeSalvo until Friday, March 19, just before he completed the *pro forma* charter form to be mailed to NATIONAL, provided:

> "Vessel requires drydocking November, 1971. It is the intention of the Owners to drydock the Vessel Portugal, Spain or Japan, and charterer *guarantees to place Vessel in position to drydocking* in any of those countries." (App. 15, emphasis added)

Theodoracopulos testified, uncontradicted by DeSalvo, that even prior to receipt of this precise language, he advised DeSalvo that the requirement of a guarantee as to the place of dry-docking was utterly unacceptable to HELLENIC.

Upon receipt of the *pro forma* containing the dry-docking language proposed by INTEROCEAN, Theodoracopulos reiterated to DeSalvo that the clause remained unacceptable.

According to Theodoracopulos, DeSalvo's reply was to the effect that DeSalvo was pessimistic as to whether a charter could be concluded as "this [the drydocking clause] may kill the business because these people [INTEROCEAN] must have it" (Tr. 228).

Despite everything shown here from the record respecting Theodoracopulos' vigorous exceptions to INTEROCEAN's proposed dry-docking provision, the Court below found as facts that Theodoracopulos "made no comments" about this provision and "never suggested any modification of it" (App. 55).

Dry-docking was an item which was the subject of numerous telephone calls between March 22 and 24, and various attempts by DeSalvo to bring the parties together, as his notes reflect. The fact is that the special addition to the standard dry-docking clause required by INTEROCEAN was not only a very major term which occupied much of the time of the parties, but the substance of the clause went to the very essence of the charter under negotiation, namely, the ability of HELLENIC to tramp the vessel in the worldwide oil trade without crippling and unacceptable limitations.

Respondents' expert Ferris, an acknowledged authority on the tanker industry who petitioner's counsel conceded to be ". . . an experienced shipping man and thoroughly familiar with the New York chartering practices", testified that the dry-docking clause proposed by petitioner was a "*. . . provision of substance and that there had to be an agreement between the parties on this matter in order for there to be a complete fixture*" (Tr. 336). (emphasis added) According to Ferris, who was present throughout the trial, the dry-docking provision required by INTEROCEAN that the charterer *guarantee* to place the vessel in position in dry-

dock in Portugal, Spain or Japan was a provision of limitation which the charterers never accepted and was not customary in the industry.

"The Court: Is there a custom in the trade and in the industry in the chartering of these vessels that the port at which the drydocking is to be carried out is always left to the selection of the charterer?

The Witness: *No.*

The Court: Did you hear the testimony of Mr. Gorrissen?

The Witness: Yes.

The Court: You differ with him?

The Witness: Oh yes.

Q. In what respect do you differ from what Mr. Gorrissen has testified, Mr. Ferris? A. *It is the owner of the vessel who drydocks the vessel and he determines where he is going to drydock his ship. He makes arrangements for the drydocking and drydocking arrangements are not simple.*

The Court: Is it the custom of the industry and the trade to let that designation be made by the charterer after the proforma charter has been signed?

The Witness: *In the ordinary events where there is no addition to this printed language,* the parties would agree on a time. The charterer would let the owner know that he can now drydock the ship and this, of course, would have been a matter of some prior discussion. The owner would have—

The Court: The time is specified here as a certain time in November. Is it the custom in a proforma charter signed after a fixture that the place would simply be left vacant as to the port of drydocking to be filled in at the charterer's suggestion after the proforma charter is signed?

The Witness: I don't quite get this, your Honor. This particular language in this charter is not something that the two parties have agreed upon.

The Court: *That is for me to decide,* if they have agreed upon paper it shall be November.

The Witness: November and 15 days.

The Court: November and 15 days.

The Witness: But there is an addition there and there cannot therefore be any agreement in connection with this.

The Court: What addition is there?

The Witness: The addition is that the vessel shall drydock in either—it is the intention of the owner to drydock the vessel in Portugal, Spain or Japan and charterer guarantees to place the vessel in position to drydock at any one of the countries. *This is something that nobody agreed* to *and it is a very important point.*

The Court: *You mean there was no agreement as to the place of drydocking?*

The Witness: *That is right.*

The Court: Is it the custom in the trade to have the place of drydocking designated by the charterer?

The Witness: *No.*

The Court: After the proforma charter is signed?

The Witness: May I speak?

The Court: If you can answer that I would appreciate it.

The Witness: I am not sure I understand exactly the way in which to answer that question. The parties when they agree in accordance with the standard clause know that the vessel is going to have to drydock. In this case they knew that the vessel would have to drydock in November for 15 days.

The Court: Yes.

The Witness: The custom would have been under those circumstances for the charterer and the owner to discuss something before November the probable place of drydocking for the charterer to give the owner an idea as to the intended trades so that they would know about where that vessel would be in November and for them then to make their arrangements for drydocking.

> The Court: Is it the custom of the trade on a tanker coming from the Persian Gulf to be at the drydock in the Iberian Peninsula or in Japan?
> The Witness: No, no such custom." (Tr. 339-342) (emphasis added)

That the Court misunderstood the effect of the clause proposed by INTEROCEAN on the vessel's trading range is revealed by the following passage:

> "The testimony of DeSalvo was that, in his experience, this was a clause, the details of which could be and often were worked out in the future by the parties; and that the essential facts, such as the duration of drydocking and the approximate date, which were important to the trading range, of the Vessel had been agreed upon". (App. 55).

We agree with both DeSalvo and the Court that the duration of the dry-docking and the approximate date of the dry-docking, as they bear upon the trading range, are essential terms of the charter but they are not any less essential than *the place of dry-docking,* which is *the* most important term effecting the trading range. If the Court believed, as it seems to have, that the place of dry-docking does not effect the trading range, then there was clear error on its part and its finding as to dry-docking must be reversed.

Notwithstanding there can be no serious question that it is the owner who dry-docks the vessel and determines at which shipyard he is going to do so, the Court, referring to Theodoracopulos and the place of dry-docking, states "since the choice was his . . . ", (App. 56) showing plainly that the Court conceived that under the language proposed by the owner, it was the charterer who had the option of dry-docking in November in Portugal, Spain or Japan. The

language of the clause was to say the least ambiguous as to who controlled the positioning of dry-docking, but any assumption that the control of dry-docking was to be on the part of the charterers, would have been thoroughly inconsistent with the established facts of life in the industry.

In Ferris' expert view, however, it was highly questionable from the language of the proposed clause whose option it would be to determine whether the vessel would go to Portugal or Spain on the one hand or to Japan on the other.

Ferris explained the impact of the language proposed by INTEROCEAN as follows:

> Q. What would the practical consequences for the parties trying to operate this vessel be of (sic) the terms of that provision (sic) are contained in the pro forma charter? A. Before I could answer that I would have to have this particular provision clarified. There is in this clause a question mark: Whose option is it to determine whether the vessel would go to Portugal and Spain or the Iberian Peninsula, on the one hand, or Japan, on the other, and that would be a very important element, because if the owner determined that the vessel should go to the Iberian Peninsula or if the owner determined that it would go to Japan, then the charterer would be limited in his handling of that ship so that he would be in that position where he would live up to his guarantee of placing the vessel in that position.
>
> Q. Suppose it was the charterer's option, what would your answer be, then? A. To that extent he would be the one who would determine where the vessel would go, but he would be restricted in his handling of that vessel for a period of several months before the dry-docking date.
>
> Q. Why do you say several months, Mr. Ferris? A. The voyages for this vessel, as has been testified to

by Mr. Gorrissen, would probably be between the Persian Gulf and the Continent. A voyage between the Persian Gulf and the Continent is approximately of 65 days duration, roughly 30 days each way, ballast and loaded, and roughly five days in port. It could be slightly less, it could be slightly more, but you would have to figure accordingly. Therefore a vessel to be available in the Continent, for example, in November to lift in the Persian Gulf sometimes in the first half of October and in order to do this you would have to be scheduling the vessel on various limited voyages.

For example, you could not take that ship if she were on the Continent in early October and send her to the Persian Gulf because you would never get back to the Continent again in time for her to drydock in November.

* * *

Q. Would you say that it is fairly customary in the tanker trade for the charterer to desire to have his vessel free from any drydocking restrictions or limitations during the winter months? A. I would say that those charterers that I knew about, generally speaking, would desire this. Some were more adamant than others in their insistence on a suitable drydocking clause.

Q. Do you consider this drydocking clause that we have seen in this proforma an essential provision of the charter? A. Do I consider this an essential provision? Yes, I do. I consider it a provision that deals with substances; that affects the earning capacity of this vessel and that would have determined for me what I would pay for that ship. In other words, a ship without this limitation would be worth more to me than a ship with this limitation." (Tr. 336-339)

The gist of the Court's conclusion as to dry-docking is that dry-docking is a minor item generally not essential to be worked out at the outset of the charter. For this proposition, the Court relies on the testimony of DeSalvo and

petitioner's so-called "experts" Gorrissen and Proeller that they, in their "experience," had not encountered difficulty in working out the provisions of dry-docking clauses, which they viewed as a "minor" item. What the Court failed to discern, however, is that neither DeSalvo nor INTEROCEAN's purported "experts" had any experience whatever with the peculiar addition demanded by INTEROCEAN to the standard "Mobiltime" dry-docking clause. Witness, the following excerpt from the cross examination of INTEROCEAN's so-called expert Proeller:

> "Q. When you answered Mr. Estabrook's question to you about the practice in New York with respect to the drydocking clause, did you have any special form of drydocking clause in mind? A. Like, for instance, the one in the Mobil time charter, yes, even though just about any time charter form will have a drydocking provision.
>
> Q. Do you consider yourself in your position at Fritzen more as an owner or a charterer? A. More as an owner's representative, even though we have taken on tonnage in which case we are charterers. It has happened both ways.
>
> Q. Have you ever taken in as charterer a 50,000-ton tanker on time charter for a year? A. Not a tanker, but bulk carriers.
>
> Q. I am talking about tankers, Mr. Proeller. A. All right. Not a tanker.
>
> Q. Then you have never had the experience of working a tanker on a one-year time charter as charterer; is that correct? A. Not as charterer, no, but as an owner.
>
> Q. You have never had the experience of being charterer of a tanker for a one-year plus period? A. Correct.
>
> Q. So am I correct in saying that you have never actually dealt with the situation as a charterer of what happens as you try to program your way around let us say, for example, a November 15 drydocking guar-

anteed to have to occur in the owner's option at Spain or at Portugal or possibly Japan? A. I'm afraid I have not seen anything about Spain, Portgual or Japan in this document.

The Court: I don't know that this witness has given any testimony which warrants the nature of your cross examination.

Mr. Gilchrist: I consider it is established that he would be incompetent to testify as to the last question I put so I am going to withdraw it.

The Court: It has been answered. If you move to strike the answer, all right. Leave it in the record. I'm not going to pay any attention to it anyway. (Tr. 195-197)

The only testimony offered by INTEROCEAN on the materiality of its particular dry-docking clause was that of its "expert" Gorrissen. He could not testify, however, of having had any experience with the type of clause proposed by INTEROCEAN and his testimony suffered from his continuing assumption that the place of dry-docking would be at the charterer's option. If anything, his testimony on behalf of INTEROCEAN was undercut by his telling admission, that a restriction on the vessel's trading range, such as that contemplated by INTEROCEAN's dry-docking clause, is a matter "which must be considered major." Gorrissen gave an affidavit in support of the petition wherein he stated:

"In my experience with charter parties certain terms must be considered major such as trading limits, cargo restrictions and of course the delivery date, redelivery date and the rates." (App. 24).

At trial, Gorrissen admitted that if a charterer were required to program the OSWEGO RELIANCE during the months of November to proceed to Spain, Portugal or to Japan

for 15 days dry-docking, as required by the proposed clause, such requirement would affect the trading range of the vessel (Tr. 330-31, 333). Unquestionably, the matter of a "suitable dry-docking clause" was a major and important term of the charter negotiations, and in the absence of any agreement as to this essential item there was no "fixture."

B. *There was no agreement as to the vessel's trading limits and delivery range.*

It is beyond dispute that agreement as to a vessel's trading limits and delivery range are essential terms of a charter. The record is uncontradicted that there was no meeting of the minds as to these terms.

In his notes of INTEROCEAN's offer on March 17, DeSalvo had recorded as to trading limits:

> "trading worldwide within Institute's Warranty Limits excluding China, North Vietnam, North Korea, Cuba, Israel and all other communist countries".

The alleged "fixture" telex, read:

> "TRADING WORLDWIDE WITHIN IWL EXCLUDING COMMUNIST COMMUNIST CONTROLLED CHINA, NORTH VIETNAM NOR KOREA CUBA" (App. 61)

The exclusion of trading, however, to "Israel and all other communist countries" was not shown on the alleged "fixture" telex although DeSalvo was to later include such exclusion in the *pro forma,* but omitting the exclusion of Israel. When Theodoracopulos in reviewing the *pro forma* on March 22 found this additional exclusion, he took strong exception as HELLENIC wanted the latitude to trade with Yugoslavia, Bulgaria, Rumania and East Germany and

other communist controlled countries where Liberian flag vessels such as the OSWEGO RELIANCE did normally call (Tr. 227; App. 61, p. 2).

The alleged "fixture" telex, further specified the delivery range as "PG" meaning Persian Gulf, "EXCLUDING FAO AND ABADAN." As to this item, Theodoracopulos was clearly not in agreement with the alleged "fixture" telex, objected about it to DeSalvo and instructed that he wanted the Red Sea included in the delivery/redelivery range (Tr. 227).

That both delivery range and trading limits were still under negotiations after March 17 is shown on page 2 of DeSalvo's notes. The notes confirm that after HELLENIC withdrew from negotiations, INTEROCEAN belatedly agreed on the addition of the Red Sea (with the proviso, however, that no extra deviation be involved) but did not yield at all on the other trading exclusions, i.e., "no trading Yugo, etc." (App. 61 p. 2). The fact is that notwithstanding the absence of such exclusions from the "fixture" telex INTEROCEAN was not in any position to agree that the vessel could trade to "all other communist countries" except the four expressly shown in the "fixture" telex. By virtue of her Nationalist Chinese crew, the OSWEGO RELIANCE could not trade with *any* communist nation, a fact never disclosed to respondents at *any* time during the negotiations.

Such exclusions and the failure of agreement as to delivery range, directly affected the vessel's trading limits, which INTEROCEAN's own "expert" witness, Gorrissen acknowledged "must be considered major" (App. 24, Tr. 333). The Court's failure to give proper recognition to these items is clearly erroneous.

C. *The negotiations were specified to be "Mobiltime sub-details", i.e., subject to agreement as to the details of the charter party form, and there was no agreement as to those essential terms.*

DeSalvo readily conceded that both parties to the negotiations had, on the afternoon of March 17, specified for "Mobiltime sub-details", meaning that they had agreed on the printed "Mobiltime" form but were subject to agreement as to the details of that form (Tr. 107-8). DeSalvo's own notes from which the alleged "fixture" telex was drawn, show this to be the case but he was completely unable to explain how this reservation came to be omitted from the telex.

> "Q. Then why did you drop it when you came to send out this alleged fixture letter? A. I really don't know. I have no answer for that.
>
> Q. Did you think it was completely unimportant? A. No." (Tr. 111)

With respect to "sub-details", the Court below found:

> "The Mobiltime Form contained the arbitration clause, *the words 'sub-details' (i.e., subject to details in the telex),* which DeSalvo testified meant in the industry 'filling in the blanks' to supply the details of completing the charterparty form, e.g., the description of vessel, her fuel oil contents, her speed, RPMs, the insurance valuation, in short, to fit the form to what had been orally agreed on so that 'sub details' could vary from charter to charter depending on what details the parties had left to be filled in after agreement. DeSalvo testified quite clearly that, while the 'details' might vary, 'sub details' certainly did not mean subject to reviewing the whole negotiation again." (App. 44) (emphasis ours).

"Sub-details", however, was not itself any part of the "Mobiltime" form. It was a condition which the parties themselves placed upon the negotiations. DeSalvo himself conceded that to some people in the trade it did mean something more than "filling in the blanks of the form."

> "I said it meant one thing in negotiating between some people and another thing between others, depending on what had been discussed at the time of negotiations." (Tr. 108)
>
> * * *
>
> "Q. When you set out the various terms you have here and then you also say sub details, does that mean that when you pass the form of the charter that is going to be executed that you can delete or add to any of these provisions as you see fit unless they are the subject of particular reference in the elements that you have mentioned? A. Not unless it is agreed by both parties.
>
> Q. There has to be agreement, hasn't there? A. It would on anything that wasn't talked about." (Tr. 109-110)

The Court's opinion wholly ignored the testimony of three witnesses, Theodoracopulos, Spears and Ferris, two of them no less disinterested in the events than DeSalvo, and the last an independent and highly qualified expert, to the effect that until all the details which are "subject to details" are in fact finally agreed upon, a firm fixture does not come into existence.

According to Theodoracopulos:

> "A. To me it means that I will have to have all the details—that unless I have all the details agreed upon that I have no fixture.
>
> Q. What does the sub part of this abbreviation, subdetails mean? A. Subject to mutual agreement of all the terms" (Tr. 225).

According to Spears:

"A. It means that a certain form, a certain printed form of the charter will be used as the basis for concluding the final charter party.

The Court: Subject to changes?
The Witness: Subject to changes.
The Court: Set forth in the Telex?
The Witness: Not necessarily, your Honor, because there are many other items that would come about. The teletype, as I understand it, meant subject to working out the details of this charter. That is what we were talking about" (Tr. 266).

According to Ferris:

"A. It would mean that the form of charter that we would use would be the Mobiltime form and that we would have to work out the details.

Q. What does the sub in sub-details stand for? A. Subject to details.

* * *

Q. Mr. Ferris, would you attempt to offer or trade a vessel that you had on sub details? A. No.

Q. Why not? A. I wouldn't be sure I had it. It would be like selling stock I didn't own and not having the possibility of buying it later" (Tr. 345-46).

The economic effects of the various "details", including the additions and deletions contained in the *pro forma* charter demonstrate that the Court's finding that the condition "Mobiltime sub-details" was nothing more than "filling in the blanks" is clearly erroneous. Such assertion, given the number of substantive items which had not been agreed to, is virtually analogous to a claim that the parties had agreed to the form of a blank check.

D. *There was no agreement as to insurance.*

While the Court found that there was agreement as to insurance, the clear weight of evidence is to the contrary. This important item was a prime area of disagreement between the parties and had not been resolved at the time respondents withdrew from negotiations.

The Court based its finding on its unfounded inference that HELLENIC and NATIONAL "both knew the facts about the insurance carried by Bethlehem Steel" (Tr. 148). Such finding was clearly erroneous. In the first place, no deletion was shown on the alleged "fixture" telex as to Clause 23 of the "Mobiltime" form which required the owner to have a P & I entry. That deletion did not and could not have come to the attention of respondents until March 22, when they received the *pro forma*. Secondly, the inference that respondents "knew" that Bethlehem was a "self-insurer" is not only completely without evidentiary support, but there is no showing that Bethlehem was, in fact, ready and willing to unconditionally underwrite the potential third-party liabilities of INTEROCEAN and the OSWEGO RELIANCE, including potentially vast liability for oil pollution, which are ordinarily the subject of a P & I entry. Moreover, neither Bethlehem or INTEROCEAN, as so called "self-insurers", had anything equivalent to the worldwide network of correspondents and facilities of the P & I Clubs for the immediate posting of security in the event of arrest of a vessel, a principal concern of a charterer (Tr. 60-1).

DeSalvo's contemporaneous notes of the negotiations and the alleged "fixture" telex contained no mention of insurance and the negotiations being "Mobiltime sub-details", it remained, as DeSalvo admitted in his sworn statement, for the parties to discuss the insurance to be

called for under the proposed charter (App. 65, p. 21). The alleged "fixture" telex itself showed no exclusion of the standard insurance provisions contained in the "Mobiltime" charter party form. That form provides in pertinent part:

> Clause 12(a): "Owner will provide and/or pay for . . . all P & I, Hull and other insurance on Vessel . . ."
>
> * * *
>
> Clause 23: "Owner at its expense, throughout the period of this Charter, shall have Vessel fully entered in a Protection and Indemnity Association or Club, in good standing, in both Protection and Indemnity classes."

When the *pro forma* was received by respondents on the 22nd, Clause 23, the warranty that the vessel had a P & I entry was deleted in its entirety despite the fact there had been absolutely no prior discussion with respondents of such deletion and Clause 12(a), which required the owner to provide or pay for such insurance, had not been deleted.

Clause 23 was deleted by DeSalvo at the instructions of INTEROCEAN because INTEROCEAN was a "self-insurer," meaning, in the absence of proof of a separate insurance fund, the vessel was uninsured. At the time of the alleged "fixture" telex of March 17, and thereafter INTEROCEAN accordingly had no intention of entering the vessel in a P & I Club notwithstanding that both Clauses 12(a) and 23 of the "Mobiltime" form required such insurance. DeSalvo himself was unaware on March 17, that the OSWEGO RELIANCE did not have a P & I entry as this was apparently the first time he had ever done business with INTEROCEAN or its parent, Bethlehem (Tr. 89).

Most significantly, there is no suggestion in the record that either HELLENIC or NATIONAL had done any chartering

business either with INTEROCEAN or Bethlehem before, and in fact, INTEROCEAN was unacquainted with HELLENIC to the extent that it made the obtaining of "an appropriate guarantee" a condition of the charter. In the absence of any prior dealings between the parties, to somehow attribute knowledge to respondents that INTEROCEAN was a "self-insurer" is patently ridiculous.[6] If anything, the alleged "fixture" telex of March 17 gave both the broker and respondents every reason to believe that INTEROCEAN did have a P & I entry, as contemplated by the printed provisions of the charter form. Considering that the parties were far apart on the 22nd as to dry-docking and TOVALOP and that Theodoracopulos left for vacation at noon on March 23, not having made a thorough review of the charter, the allegedly "inescapable" conclusion of the Court that respondents knew, prior to receipt of the charter of INTEROCEAN's insurance arrangements, is thoroughly unfounded.

Also to be considered was that without P & I coverage, INTEROCEAN was uninsured for liability to the charterer for loss, damage or shortage to cargo (App. 71, p. B6; 74, p. D6). It was likely the absence of such insurance coverage prompted INTEROCEAN to unilaterally delete Clause 24(ii) of the *pro forma,* a deletion not mentioned in the "fixture" telex. The deleted provision imposed liability on the owner

---

[6] It might ordinarily be tempting to conclude that the Court, based upon its own expressed familiarity with Calmar Steamship Company (see Tr. 75-76), another shipping subsidiary of Bethlehem, reached *aliunde* for its finding of knowledge in the shipping industry that Bethlehem and its subsidiaries are "self-insurers". However, in *Calmar SS Corp.* v. *United States*, the PORTMAR, 103 F. Supp. 243 (S.D.N.Y. 1951) rev'd 197 F.2d 795 (2nd Cir. 1952), cert. granted, 344 U.S. 853 (1952), vacated 345 U.S. 46 (1953), decree aff'd, 209 F.2d 852 (2nd Cir. 1954) decided by the same Trial Judge, Calmar was not a self-insurer as the suit involved a claim under war risk policies against British underwriters.

for admixture, leakage, contamination or deterioration of cargo resulting from "the fault of the servants of the owner in the loading or in the discharge of cargo", i.e., crew negligence, a risk which would have been covered had the vessel had a P & I entry.

Clearly, there was never a meeting of the minds as to the insurance provisions which respondents marine insurance expert Porvancher and chartering expert Ferris both affirmed is of vital interest to a charterer. (Tr. 60-1, 344-5)

The question of insurance also involved the OSWEGO RELIANCE's lack of entry in TOVALOP, a P & I covered risk.[7]

E. *There was no timely agreement as to entry into TOVALOP and who was to bear its cost.*

Negotiations having been "sub-details", entry in TOVALOP was an item of the "insurance evaluation" (App. 65, p. 21) which remained for the parties to properly discuss.

Had INTEROCEAN disclosed on March 17, that it was not insured as required by Clause 23(a) of "Mobiltime", such advice would have focused attention on the lack of insurance coverage including TOVALOP which requires P & I entry. Since respondents had had their own tonnage entered in TOVALOP since January 1970 (Tr. 270), it is likely that

---

[7] The 1971 Rules of the U.K. Club, the largest in the "London Group," provide coverage for:

> (14) (A) Loss or damage or expense for which the Owner may as a party to the Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution, be liable or in respect of which such Owner would be insured if the entered ship were fully insured against such liabilities under a Certificate of Entry of the International Tanker Indemnity Association Limited. (App. 71 p. B 4)

they would not have considered further negotiations for the OSWEGO RELIANCE in the absence of such coverage.

It is evident, in any event, that TOVALOP was treated as a major point of disagreement between the parties and that HELLENIC would have been sorely limited in its ability to trade and sub-charter the OSWEGO RELIANCE without such coverage. By March, 1971, approximately 65 to 70% of the world's tanker tonnage had been enrolled in TOVALOP (Tr. 66-7) and Chevron and other major oil companies would not charter the vessel without her being so entered (App. 68).

The issue was of such importance to the parties that according to INTEROCEAN itself, TOVALOP was ". . . the item which caused the most delay . . ." (App. 20). It was such a major item that the question of entry could not be dealt with by INTEROCEAN's own chartering personnel and required that it be taken up at higher levels of the company and in London (Tr. 225, 226). Even DeSalvo advised INTEROCEAN that TOVALOP was being required by charterers and whether it was the OSWEGO RELIANCE or another vessel, it was apparent that INTEROCEAN would have to join TOVALOP, a view with which Germano of INTEROCEAN himself concurred (App. 65, pp. 28, 30).

When on Tuesday, March 23rd, DeSalvo advised Theodoracopulos that INTEROCEAN had decided to enter the vessel in TOVALOP, but that HELLENIC would have to pay the premiums, a demand contrary to clause 12 (a) of "Mobiltime," Theodoracopulos rejected any idea the cost of such insurance premiums would be for the account for HELLENIC (Tr. 228-29) and until the termination of negotiations on March 24, the parties remained apart on this important term. In fact, on the afternoon of the 23rd, DeSalvo ad-

vised Germano that it is "my feeling that we would have difficulty getting [the] charter party together if owners continued to insist the cost of TOVALOP would be for charterers' account." (App. 65, p. 41) It was only after HELLENIC withdrew from negotiations on March 24, that INTEROCEAN belatedly and unilaterally offered to pay the TOVALOP premiums itself. (App. 20)

Certainly, TOVALOP was a major issue as to which the parties did not agree on March 17, and as to which they remained apart through the withdrawal of respondents from negotiations on the 24th. If the matter of TOVALOP did not come up, as mentioned by the Court until after the alleged "fixture" telex of March 17th, it was because of material non-disclosure by INTEROCEAN of the vessel's lack of any P & I coverage, including TOVALOP. Given such fact, the finding of the Court that the matter of TOVALOP did not arise until after a sub-charter to Chevron was discussed on March 18, is irrelevant since the issue of TOVALOP relates directly back to INTEROCEAN's failure to disclose on the preceding day that it did not have *any* insurance against potential third party liabilities including, most importantly for a tanker, protection against liability for oil pollution.

F. *There was no agreement as to speed, performance, the penalty for underperformance and the mode of payment of hire.*

DeSalvo, at INTEROCEAN's request, unilaterally made additions and deletions of substance which had not been agreed to two major provisions of the charter, i.e., the owner's express warranty as to the vessel's speed and performance and the charterer's measure of recovery for breach of that warranty.

The alleged "fixture" telex of March 17 specifies "speed 16.5 knots on 100[tons] bunker C per day . . . 'Mobiltime' excluding Clauses 9, 12A II, 12B II, and 12B III." The printed "Mobiltime" form at Clause 1(a) contains an express warranty and undertaking on the part of the owner that the speed of the vessel is her speed "when fully loaded to summer freeboard". If, as the Court found, the alleged "fixture" telex was, within the contemplation of the parties, a binding agreement, then the *pro forma* of the "Mobiltime" charter form prepared by DeSalvo, upon instruction from INTEROCEAN, should have conformed to the terms of the telex warranting that the OSWEGO RELIANCE would make "16.5 knots on 100 bunker C per day . . . when fully loaded to summer freeboard".

DeSalvo was instructed by INTEROCEAN to delete the phrase "when fully loaded to summer freeboard" and to add instead the language "average speed loaded and light in moderate weather (maximum Beaufort No. 5)". The effect of this material change was that the performance of the vessel was to be determined on an average of loaded and ballast condition rather than fully loaded and at an arbitrarily specified weather condition which was neither agreed to by the parties or necessarily customary.

Since a vessel's speed in a light condition is considerably different from her speed when fully loaded, and there had been no discussion whatsoever as to the weather limitation for measuring such performance, this unilateral change by INTEROCEAN affected items of substantial economic importance to the charter, namely the warranted speed and the standard for measuring underperformance (Tr. 254-6, 277-8, 283-91, 305).

Further, the insertion of "maximum Beaufort scale 5" in Clause 2(a) of the Charter and the figure "0.25" in the

blank space in Clause 2(d), when according to Spears the statistically correct figure should have been "between 30¢ and 40¢ not 25¢ per one knot" (Tr. 284); was another important economic term which had not been agreed upon by HELLENIC. The alleged "fixture" telex was silent as to any limitation on the measure of damages in the event of deficiencies in the vessel's warranted speed. Thus, if the space in Clause 2(d) had been left blank the charterer in the event of a deficiency could claim whatever damages he is able to prove and his claim would not otherwise be limited. If, however, the charterer and the owner, of course, had mutually agreed to the measure of damages, the agreed figure would have been inserted in the blank space. But this did not happen here. Rather, INTEROCEAN caused the unilateral insertion of $0.25 per dead weight ton a provision of limitation which would have effectively compromised any claim by the charterer for underperformance.

The vessel's speed and performance are items of substance in a charter of this nature, as attested to by both Spears and Ferris, and had not been agreed to.[8]

These additions and deletions to the "Mobiltime" form made at the direction of INTEROCEAN evidence that it did not consider, when it was not in its interest to do so, that a binding "fixture" had come into existence. In making such

[8] With a vessel such as the OSWEGO RELIANCE of 49,283 tons deadweight, the economic significance of the warranty of speed and performance and any arbitrary limitation on underperformance is readily apparent. Assuming underperformance of only one knot below the guaranteed average speed and INTEROCEAN'S proposed limitation on the reduction in hire per calendar month of $.25 per deadweight, the monthly penalty per knot was limited to $12,320.75 or $147,849 per knot on an annual basis. At $.40 per deadweight ton, the penalty per knot would amount to $19,713.20 per month or $236,558.40 on a annual basis. The difference between the two measures is $7,392.45 per month and $88,709.40 annually per knot. It is obvious that this so-called "blank" in the charter party form was hardly an insignificant item.

unilateral additions and deletions to the "Mobiltime" form INTEROCEAN was in effect making a counteroffer as to important economic terms.

These substantive changes further undercut the testimony of DeSalvo and the Court's finding that "subject details" merely meant "filling in the blanks".

Additionally, the printed language of the Mobiltime form at clause 4(a), provides that hire is to be paid monthly in advance. Theodoracopulos excepted to this provision of the printed form after receiving the *pro-forma,* pointing out to DeSalvo, that it was not unusual for the hire payments to be made semi-monthly in advance (Tr. 227). Again, DeSalvo's contemporaneous notes, bear out such exception (App. 61, p. 2).

In the absence of assent by INTEROCEAN to the payment of hire semi-monthly this remained another unagreed term of the charter of substantial economic importance, considering that the hire was on the order of $3,500,000 per annum or almost $300,000 per month. What was at stake was whether INTEROCEAN or HELLENIC would have the use of one-half the monthly hire during each month of the prospective charter term.

G. *There was no agreement as to a guarantee. No guarantee was given, and an act necessary to bring the proposed charter into existence never occurred.*

The question of the guarantee is not a matter of maritime contract, *Interocean* v. *National Shipping etc., supra,* at p. 678, and is separate from the issue of whether there was an agreement on the charter party provisions themselves.

The guarantee was, nevertheless, in the words of the Court below, "an integral part of the negotiations for the

fixture" (App. 51). Since INTEROCEAN made its procurement an express condition of the negotiations, the giving of a guarantee would have been a final act necessary for the conclusion of a charter. That event never occurred.

Despite the legerdemain of the Court below, it is crystal clear from the record that there was no agreement on the identity of the guarantor or the form of the guarantee and that no guarantee was given.

The Court conceded that the alleged "fixture" telex ". . . did not specifically state that the guarantee would be given by NATIONAL" (App. 52). The telex read:

> "CHARTERER: HELLENIC NATIONAL SHIPPING, S.A. OF PANAMA, SUBSIDIARY OF NATIONAL SHIPPING AND TRADING WITH APPROPRIATE LETTER OF GUARANTEE".

Neither the telex nor any version of the proposed charter identified NATIONAL as guarantor or other than as a disclosed agent for HELLENIC. This alone required the Court to rule in favor of respondents that no guarantee had been given. *Mencher* v. *Weiss,* 306 N.Y. 1, 4 (1953).

Contrary to the "testimony [being] clear that [NATIONAL] was the only guarantor which the parties had in mind" (App. 52), NATIONAL, because of tax reasons, had been cautioned by its accountants against giving guarantees (Tr. 251). In fact, the guarantee which INTEROCEAN and DeSalvo had in mind was the personal guarantee of Harry Theodoracopulos, a proposition which was never so much as suggested by DeSalvo to Theodoracopulos.

Theodoracopulos, testified that DeSalvo was to send him the proposed form of guarantee desired by INTEROCEAN so that he could review it (Tr. 219). DeSalvo himself

agreed that the guarantee . . . "was an item which would have to be agreed upon after [DeSalvo] had passed some form of guarantee to [Theodoracopulos] to study" (Tr. 167-169). When asked why he never sent the form of the letter of guarantee to Theodoracopulos, DeSalvo answered variously, "I can't answer that" (Tr. 136); "it wasn't sent at the time. I can't give you any particular reason why it wasn't" (Tr. 171) and "we never got to that point" (Tr. 123).

To support its finding of an agreement on the part of NATIONAL to guarantee the charter, the Court below (App. 41-42, 51) purports to rely on testimony of DeSalvo as to his conversation with Theodoracopulos when DeSalvo mentioned INTEROCEAN's requirement of a guarantee. The Court found that Theodoracopulos' alleged reply, preceding the telex of March 17, was that an "appropriate guarantee" *would* be given. DeSalvo's actual testimony is:

> "Q. Did you discuss the relationship between National and Trading and Hellenic? A. Yes, Mr. Germano wanted some—Bethlehem wanted some guarantee who Hellenic Shipping and Trading was.
>
> Q. Did you point this out to Mr. Theodoracopulos? A. Yes, I did.
>
> Q. What did he say? A. He said appropriate guarantees *could* be given." (Tr. 30, emphasis added)

This was entirely consistent with Theodoracopulos' own testimony that a guarantee could be given and that DeSalvo should send over what INTEROCEAN had in mind (Tr. 219). There is a world of difference between the Court's finding that Theodoracopulos agreed that a guarantee "would" be given and DeSalvo's precise testimony that Theodoracopulos said merely that an "appropriate guarantee could be given".

The form of guarantee prepared by DeSalvo and approved by INTEROCEAN, but never passed or discussed with respondents, is by its very text not a guarantee of NATIONAL but of Theodoracopulos personally:

DRAFT

of

DATE .....

GUARANTY OF HARRY THEODORACOPULOS

Reference charter party dated March 17th, 1971, between HELLENIC INTERNATIONAL SHIPPING, S.A. OF PANAMA, and INTEROCEAN SHIPPING COMPANY, Owners of the "OSWEGO RELIANCE" subject to terms and conditions of above mentioned charter party, *I hereby guaranty the performance* of HELLENIC INTERNATIONAL SHIPPING S.A.

.....

Harry Theodoracopulos
National Shipping & Trading Corp.

(App. 67) (emphasis added)

The form of guarantee closely followed a guarantee which was given in another transaction where DeSalvo was the broker. In that instance, involving a guarantee of a charter to HELLENIC of the S/T PERSIAN COMMANDER, the guarantee was again not that of NATIONAL but the personal guarantee of John Theodoracopulos, principal stockholder of HELLENIC's parent company. (App. 81, p. H-3)

The stock of NATIONAL was held in trust for Harry Theodoracopulos. Accordingly, in the absence of a showing of "fraud or worse" coupled with complete domination of NATIONAL by Theodoracopulos, the Court below could not properly disregard "willy nilly" the separate existence of NATIONAL and Theodoracopulos for purposes of finding

NATIONAL to be a guarantor. *Fisser* v. *International Bank,* 282 F.2d 231, 238 (2nd Cir. 1960).

What is equally crucial, however, is that even assuming the alleged "fixture" telex embodied an understanding of the parties that NATIONAL was to be the guarantor, the limitation "WITH APPROPRIATE GUARANTEE" left open the terms of an "appropriate guarantee". Otherwise, there would have been no reason for DeSalvo to have prepared, subsequent to the alleged "fixture" telex of March 17, a form of guarantee for submission to the parties. The words "WITH AN APPROPRIATE GUARANTEE" in the telex at best constituted nothing more than an offer by respondents to give a guarantee. Such an offer, however, is not a guarantee enforceable under New York law, *Savoy Record Co.* v. *Cardinal Export Corp.*, 15 N.Y. 2d 1, 7, 254 N.Y.S. 2d 521 (1964).

To paraphrase the Court of Appeals in *Savoy,* the language "CHARTERER: HELLENIC INTERNATIONAL SHIPPING, S.A., OF PANAMA SUBSIDIARY OF NATIONAL SHIPPING AND TRADING WITH APPROPRIATE GUARANTEE" in the alleged "fixture" telex must be viewed, as it relates to NATIONAL, only as an offer to NATIONAL to enter into a binding personal commitment as guarantor, and the Court cannot, without more, convert DeSalvo's telex to NATIONAL as agent for HELLENIC into a binding acceptance of such offer. *Savoy, supra* 15 N.Y. 2d, at p. 5.

H. *That the terms not agreed to are essential is evident from the economics and custom of the industry and from the words and acts of the parties as well.*

In order to prevail in this case, INTEROCEAN must prove an agreement containing an arbitration clause binding under general contract law. If there was any part of the alleged charter agreement as to which the parties minds did not meet, then the entire instrument is a nullity as to all of its terms and parts. *Compania Bilbanina* v. *Spanish-American Light & Power Co.,* 146 U.S. 483, 497, 13 S. Ct. 142, 36 L. ed. 1054 (1892) and although:

> "[t]here is authority to the effect that unimportant details may by consent be deferred to subsequent determination without leaving the contract undone . . . . nothing is more indicative of the intent of the parties to a transaction then their common interpretation of their own words and acts". *Orient-Mideast Great Lakes Service* v. *International Export Lines,* 315 F.2d 519, 522, 523 (4 Cir., 1963).

In *Orient-Mideast,* which involved negotiations for a time charter of the vessel "HONG KONG EXPORTER" on the New York Produce Exchange form, all of the prospective charter terms were agreed upon except the restrictions on the quantity of stores and water allowed to be carried aboard by the Owner. While a reservation as to that question was outstanding the Owners proposed a further exclusion of the United Kingdom from the vessel's trading limits.

There, the Fourth Circuit, relying upon the legal theorum that when an offer or a counteroffer is accepted subject to a condition or reservation, neither party is bound to an agreement until the condition or reservation has been withdrawn or satisfied, held the Owner was not obligated to

any contract whatever or to the pursuit of further negotiations, citing among other authorities *Iselin* v. *United States,* 271 U.S. 136, 139, 46 S. Ct. 458, 70 L. ed. 872 (1926) and *Nolan Bros. Inc.* v. *Century Sprinkler Corp.,* 220 F. 2d 726, 728 (4 Cir., 1955).

The Charterer had contended in *Orient-Mideast,* as INTEROCEAN does here respecting drydocking and other terms, that the reservation as to stores and water was a "minor" item and that a fixture was consummated irrespective of the lack of an agreement on that point. The trial court had accepted that argument and had awarded charterer damages for owners' breach, but the Fourth Circuit, considering the attention given in the negotiations to the alleged "minor" item, reversed holding that no agreement had been reached.

> "[W]e need not deal with those principles, because quite plainly both parties understood stores and water to be a critical term of the proposed agreement. Until it was mutually adopted, no clause of the charter party was effective . . . Here, charterer as well as owner plainly treated stores and water as an essential of the agreement. We simply take them at their word." Id. p. 522, 523.

In the instant case, the outstanding terms as disclosed by the alleged "fixture" telex are not even arguably "minor" terms. The alleged "fixture" was subject to agreement as to a "suitable drydocking clause", it was subject to an "appropriate New York Letter of Guarantee," it was subject to negotiations of the details of the "Mobiltime" charter form, including speed and performance, the payment of hire and the liability of the owner for damage and/or contamination to cargo. Further, there was never any agreement on trading limits, delivery range, insurance and TOVALOP.

However, even if such terms, as TOVALOP and dry-docking could conceivably be argued ordinarily to be "minor" items, the conduct and action of the parties indicates that in this particular instance, these items were deemed by the conduct of the parties to be essential terms. The exchange of telexes and telephone calls on these two points alone show that the parties attached such importance to them that they cannot be characterized as being "minor". The statements of DeSalvo himself, as to the difficulty of getting the charter party together on these two items should alone be conclusive of the issue.

With a charter calling for hire in the amount of $3,500,000 per annum, the words and acts of the parties manifested an intent to delay approval of all of the terms till they could be incorporated in a written document for a last appraisal (Tr. 219, 252).

> "In circumstances, such as we now have, evincing an intent to delay approval until all the covenants and concessions may be aligned in a written document for a last appraisal, the law considers there is no meeting of the minds prior to the adoption of the incorporating writing. Banking & Trading Corp. v. Floete, 257 F. 2d 765, 769 (2 Cir. 1958); Julius Kayser & Co. v. Textron, Inc., 228 F. 2d 783, 790 (4 Cir., 1956). Interestingly, Corbin on Contracts, supra, § 30 p. 48, includes our very situation in exampling instances of when the parties are taken to have intended their agreement to await reduction into a final writing: "(2) Next, there are cases in which they [the parties] clearly point out one or more specific matters on which they must yet agree before negotiations are concluded". *Orient-Mideast, supra,* at p. 524.

The Court below relied heavily on DeSalvo's assertion that he was authorized by Theodoracopolus on either Friday the 19th or Monday the 22nd to offer the vessel on

subcharter to Chevron (Tr. 37) as evidencing a complete meeting of the minds as to the charter. The Court wholly ignored the following contradictory testimony of Theodoracopolus:

> "A. Well, in every one of our conversations with Mr. DeSalvo we discussed tanker market conditions and what was happening. This is the normal course for people in our business to do and at one time Mr. DeSalvo mentioned, around noontime or so, that this possibility of Chevron having a requirement for a vessel of this size for PG to South Africa. I told him to check it out and let me know.
>
> Q. Did you authorize him to make a firm offer on your behalf to Chevron? A. Absolutely not." (Tr. 223)

The Court's reliance on the alleged authorization from Theodoracopulos to offer the vessel on sub-charter to Chevron is sorely misplaced. From the very nature of the negotiations it is clear that the OSWEGO RELIANCE, at least at the outset of the proposed charter, would be tramped on a voyage to voyage basis. When DeSalvo, then, in the course of the negotiations for the prime charter advised Theodoracopulos of the prospect of a sub-charter to Chevron, Theodoracopulos would have been an imprudent businessman had he not authorized DeSalvo to explore that possibility.

But to authorize a broker to pursue the possibility of a charter is a far cry from claiming that the vessel was offered out to Chevron firm, unconditionally and without reservation. Thus, contrasted with DeSalvo's detailed notes of the negotiations between INTEROCEAN and respondents, no notes whatever were produced to evidence comparable negotiations with Chevron.

According to Theodoracopulos, the conversation about the prospect of a charter to Chevron occurred on March 18

or 19th. At that time neither the *pro forma* nor the form of guarantee requested by Theodoracopulos had been received from DeSalvo or INTEROCEAN. By DeSalvo's own notes the parties were "sub-details" and none of the details to be proposed by INTEROCEAN had yet been given to Theodoracopulos. DeSalvo's claim of instruction to offer the OSWEGO RELIANCE to Chevron without reservation, is simply incredible.

Moreover, if, as the Court held, the parties had accepted the alleged "fixture" telex of the 17th as representing a complete agreement as to all essential terms, why was it then necessary thereafter for DeSalvo to confer further on the 18th and 19th with Germano as to the preparation of a *pro forma* charter and the form of a guarantee to be sent to respondents for review? Why was it necessary for DeSalvo to subsequently prepare two different versions of the alleged charter party including a *pro forma* or "working copy"? If INTEROCEAN itself thought it had a binding "fixture" on March 17, why did it agree to the reservations of "Mobiltime sub-details", a "suitable dry-docking clause" and "appropriate guarantee"? Why did INTEROCEAN subsequent to March 17 instruct DeSalvo to delete Clause 23 from the "Mobiltime" form, insert a limitation on the penalty for underperformance, strike the provision as to liability of the owner for negligence of its servants in the loading and discharging the cargo in Clause 24 of the "Mobiltime" form? Why did INTEROCEAN belatedly after withdrawal of respondents, agree to enroll the vessel in TOVALOP, to assume the cost of that insurance and to a delivery range which included the Red Sea?

On facts clearly analogous to these courts have found the absence of a charter and written agreement to arbi-

trate. *Superior Shipping Co.* v. *Tacoma Oriental Line, Inc.*, 274 F. Supp. 25 (S.D.N.Y., 1967).

> "This court finds, based on all of the credible evidence, that there never was one charter party dated April 11, 1966 on which both parties agreed. The original charter party containing the arbitration clause and dated April 11, 1966 was drawn up by Mr. Miral and was based on bale capacity which both Mr. Savage and Mr. Miral considered the basis of the oral fixture. This was signed by Mr. Triandafilou on behalf of the petitioners, but his signature was conditioned on Mr. Miral's changing 'bale' to 'grain' capacity. Both parties admitted that this was a major change and so this was a second charter party dated April 11, 1966. The respondent added clause 58 and then conditioned its signature upon the acceptance of this modification. The court finds that this charter party containing clause 58 amounted to a counter offer and was subsequently repudiated by the petitioner. Thus the court finds that there was no written agreement containing an arbitration clause which would bind respondent under general contract law." *Id.*, at p. 28.

POINT II

The District Court's holding that NATIONAL is bound as a guarantor or surety for the performance of the alleged charter and the alleged "fixture" telex a memorandum in writing sufficient to satisfy the Statute of Frauds as to NATIONAL is clearly erroneous.

The Court below not only held that there was an agreement by NATIONAL to give a guarantee, but that DeSalvo was NATIONAL's agent with authority to bind NATIONAL to such guarantee and the alleged "fixture" telex bearing the telex signature of Poten was a written memorandum evidencing the guarantee sufficient to satisfy §5-701 of the New York General Obligations Law,[9] the Statute of Frauds (App. 54-5). Such holding is patent bootstrapping and glaringly erroneous.

On the prior appeal, this Court, addressing itself to INTEROCEAN's claim that NATIONAL was a guarantor under the alleged charter, held that the alleged suretyship is subject to §5-701.

> "If in fact NATIONAL were a surety, however, it still could not be held accountable for HELLENIC's breach of the charter agreement. Merely agreeing to act as surety for a charter party is not a maritime contract." *Pacific Surety* v. *Leatham & Smith Towing & Wrecking Co.*, 151 F. 440, 443-44 (7 Cir. 1907). See also *Kossick* v. *United Fruit Co.*, 365 U.S. 731, 735 (1961). This suretyship therefore would be subject to the New York Statute of Frauds. Since National's alleged guarantee

---

[9] "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking: . . .

2. Is a special promise to answer for the debt, default or miscarriage of another person;"

> was not in writing, it would not be enforceable. N.Y. General Obligations Law §5-701(2) (McKinney 1964)." 462 F.2d at 678 (App. 36.)

To circumvent the bar of §5-701, the Court below found that DeSalvo was the "agent" of NATIONAL in respect of the giving of a guarantee, "no limit" was placed on DeSalvo's authority and "in the past on a previous fixture acting for this charterer [DeSalvo had] procured a guarantee of HELLENIC's performance". It is one thing, however, for DeSalvo in the past to have *procured* a guarantee and quite another to claim that DeSalvo had the authority *to give* a guarantee on behalf of NATIONAL, especially where NATIONAL was a disclosed agent for HELLENIC.

DeSalvo himself disposed of the "agency" argument that he had either the actual or apparent authority to bind NATIONAL to anything, let alone guarantee of the proposed $3,500,000 charter. On direct examination by counsel for INTEROCEAN, DeSalvo described his role:

> A. "Well, you act as a broker between the principals, the charterer and the owner to help put the deal together. You get an offer from one, the charterer of the ship and the other is the owner and you act as the go-between on the negotiations and help pull it together." (Tr. 12).

On cross examination his testimony went:

> "Q. When on Wednesday, March 17 you started out to see if this business could be put together for the Oswego Reliance, did you consider that National and/or Hellenic had made you their agent to consummate a fixture? A. No.
>
> Q. You just thought of yourself as a broker, a go-between; is that correct? A. That is correct.

Q. With two principals and one broker? A. That is correct.

Q. Passing the offers and the counter back and forth between the parties and hopefully they would get together and you would earn your commission and a piece of business would be fixed? A. That is correct.

Q. So that you didn't consider yourself National's agent?

Mr. Estabrook: I object to that. That is a question of law.

The Court: He can testify as to whether he felt he was the agent. The objection is overruled.

A. No, I did not.

Q. Or Hellenic's agent? A. Or Bethlehem's agent.

Q. Or Mr. Theodoracopulos' agent? A. That is correct.

Q. Or Mr. Spears' agent? A. That is correct." (Tr. 151-52).

The Court itself, just following this testimony, declared that the matter of agency was not an issue in the case:

"Mr. Gilchrist: I would like to know from counsel whether in light of our earlier colloquy about what we agreed to be the two issues in the case he is abandoning this theory that is put forward at pages 16 and following [of INTEROCEAN'S Trial Memorandum] that National gave Mr. DeSalvo the status of an agent for it.

The Court: There is no claim on that as I understand his case.

Mr. Estabrook: My claim is, your Honor, that National gave Mr. DeSalvo as a broker instructions to Telex or communicate with Bethlehem as to their position in this case.

The Court: As a means of communication in order to create a memorial.

Mr. Estabrook: And consequently a Telex signed by Mr. DeSalvo is sufficient to bind National as far as

this is concerned because they gave him the information and it was his job to pass it on to Bethlehem.

* * *

The Court: We won't argue about it now.

There is no claim here that he was the agent of anybody." (Tr. 153-54). (emphasis ours)

If there were any "agents" involved in these negotiations they were NATIONAL acting for HELLENIC and Steamship, acting through Germano for INTEROCEAN. Moreover, whatever the custom that a charter may be evidenced by a broker's "fixture" note, there is no evidence in the record of any custom that brokers in the chartering business in New York, especially those dealing directly with both principals, are empowered to bind or give guarantees of the performance of charter parties on a principal's behalf without express written authority to do so. No such authority, written or otherwise, was given here.

The preparation of a form of guarantee by DeSalvo, was not, as the Court below found, merely to memoralize something which had already been agreed to, but rather strongly evidences that the parties intended that the guarantee would not come into being until the identity of the guarantor and the terms had been agreed to and it was subscribed so as to be enforceable under the Statute of Frauds. *Scheck* v. *Francis,* 26 N.Y. 2d 471, 311 N.Y.S. 2d 841 (1970).

The obligation of a guarantor especially where as here, INTEROCEAN now claims damages in the amount of $1,400,000 is a

"... heavy one and the courts should refrain from foisting such an obligation upon a party be he an individual or corporation, ... absent the requisite, clear and unequivocal evidence to be gathered from the writing itself that he intended to assume such a liabil-

ity." *Savoy Record Co.* v. *Cardinal Export Corp., supra,* p. 6.

In *Salzman Sign Co.* v. *Beck,* 10 N.Y. 2d 63, 217 N.Y.S. 2d 55 (1961) the contract contained a provision that:

> "Where the Purchaser is a corporation, in consideration of extending credit to it, the officer or officers signing on behalf of such corporation, hereby personally guarantee the payments hereinabove provided for".

The agreement was executed on behalf of the corporate purchaser by one of its officers who signed as "Irving Beck Pres". Upon default of the buyer the seller sought to enforce the above provision against Beck as guarantor.

> "Although the Court of Appeals observed that a 'plausible argument' could be made that a corporate officer who signed his name to such a contract is presumed to have read and understood it, 'and so should be considered bound by its plain language', . . . [it] concluded 'that to allow recovery against the signing agent, simply on the strength of the above clause, 'would thwart the purposes of the Statute of Frauds' (10 N.Y. 2d at p. 66 . . .). The better rule . . . that a statement in a contract purported to bind . . . individually, the parties signing in a representative capacity, 'is not sufficient for Statute of Frauds purposes without some direct and expressed evidence of actual intent' on his part to be bound". *Savoy, supra,* p. 5.

In *Savoy,* the contract provided that the agent "for one ($1.00) dollar and other and good and valuable consideration agrees by its signature to guarantee the payment of all moneys payable to Savoy . . .". The contract was signed "accepted and approved Cardinal Export Corp., as agent on behalf of Armonia E. Ritmo by: /s/ Arthur Lerner". In that case, the Court of Appeals held:

> "[t]here is . . . before us no such 'direct and expressed evidence' surely no more evidence of intention on the part of the agent (Cardinal) to be bound than there was in the Salzman case. The evidence to be gleaned from the writing, if not all the other way, is at best highly equivocal and ambiguous. Not only did Cardinal sign solely as 'As Agent' but it underscored the limited nature of the signature by adding 'On behalf of Armonia' ". *Id.* p. 6.

Here, the text of the alleged "fixture" telex was by the Court's own finding unclear as to who the guarantor would be, the form of guarantee prepared but never submitted to respondents was not the guarantee of NATIONAL, and there was no clear and direct proof of NATIONAL's intention to give such guarantee nor of any agreement as to the terms thereof. Contrasted with *Savoy* and *Salzman* where the alleged guarantees were actually signed by the agents sought to be charged as guarantors, the broker in this case upon whose telex signature the Court relies, disclaims that he had actual or apparent authority to bind NATIONAL.

NATIONAL, as an agent for a disclosed principal cannot be personally bound in the absence of clear and express evidence of its intention to superadd its liability to that alleged for HELLENIC. *Savoy Record Co.* v. *Cardinal Export Corp., supra,* p. 5. The findings and conclusions of the Court below as to a guarantee are therefore plainly erroneous and should be reversed.

POINT III

NATIONAL was not a party to any agreement to arbitrate and the Order directing it to do so is clearly erroneous and contrary to law.

The holding of the Court below that NATIONAL, either as an agent or alleged guarantor of HELLENIC's performance, is bound to the alleged charter and to arbitrate contravenes settled law. *Taiwan Navigation Co.* v. *Seven Seas Merchants Corporation,* 172 F. Supp. 721 (S.D.N.Y. 1969); and see *Orion Ship. & Trad. Co.* v. *Eastern States Petroleum Corp.,* 312 F.2d 299 (2nd Cir., 1963).

In reversing and remanding this case for a hearing pursuant to §4 of the Arbitration Act this Court directed that NATIONAL was entitled to a hearing on the issue of

> ". . . whether [it] is a party to the charter agreement and hence to the arbitration agreement contained therein." 462 F.2d at 677. (App. 35)

And see also *Pan American Tankers Corp.* v. *The Republic of Viet Nam,* 296 F. Supp. 361 (S.D.N.Y. 1969); *Tubos De Acero De Mexico, S.A.* v. *Dynamic Shipping, Inc.,* 249 F. Supp. 583 (S.D.N.Y. 1966); *Instituto Cubano De Estab. Del Azucar* v. *The Theotokis,* 153 F. Supp. 85 (S.D.N.Y. 1957).

Given this issue the Court below erroneously framed the inquiry as to NATIONAL:

> "Discussion on this point is limited to *whether National should be a party to this suit as surety of the charter party* made by Hellenic, one of the issues raised by the Court of Appeals." (App. 52, footnote 3), (emphasis added)

The Court found "that NATIONAL was to be the surety for the performance of HELLENIC" and thus liable as a respondent to arbitrate. Such finding constitutes clear and reversible error.

From the various forms of charter prepared by the broker, the telex correspondence and all pertinent testimony, it is evident that at no time was it contemplated that NATIONAL would be a party to the charter itself. NATIONAL's position, as the Court itself acknowledged, was as a disclosed agent for HELLENIC (App. 38). Under any fair construction of the facts in this case, NATIONAL did not agree to guarantee the charter, but even if it had, such guarantee, in the words of the Court "was not recited in the charter party because it was no part of it; the guarantee of performance was really a separate agreement". That being the case, NATIONAL did not agree to submit to arbitration any dispute it had with INTEROCEAN, and any further question of NATIONAL's alleged obligations in the event of failure of performance on the part of HELLENIC is entirely separate and distinct from any action to compel HELLENIC to arbitrate with INTEROCEAN.

In the absence of any allegation of the use of such relationship to perpetrate fraud, *Fisser* v. *International Bank*, *supra,* at 238, any corporate or other relationship between NATIONAL and HELLENIC has no bearing on whether NATIONAL itself, acting as a disclosed agent for HELLENIC, or as a guarantor as held by the Court, was a party to the alleged charter and hence any agreement to arbitrate.

In *Taiwan Navigation Co., supra,* the charter party itself provided for a guarantee of performance by Kervin, the agent who executed the charter party on the charterer's behalf. Upon default of the charterer, the owner moved

for an order directing arbitration pursuant to the charter party against the guarantor. There, the Court squarely rejected the owner's contention that the guarantee of performance gave rise to any obligation on the part of the guarantor to arbitrate.

> "Taiwan contends that Kervin must arbitrate Taiwan's claim against Kervin under the guarantee. This novel position is based upon a most strained reading of the charter party. Kervin contracted to guarantee Seven Seas' performance of the contract of hire. The charter is silent as to how disputes concerning Kervin's liability, if any, are to be resolved.
>
> Clearly, the arbitration contemplated by the charter party is arbitration between 'the Owners' [Taiwan] and 'the Charterers' [Seven Seas]. There is nothing in writing to suggest that Kervin should have to arbitrate anything as a principal.
>
> The contention that Kervin must 'perform' for Seven Seas by going to arbitration on its behalf is rejected." *Taiwan, supra,* 172 F. Supp. 721, 722.

In this case according to the Court, the guarantee, if any, unlike that in *Taiwan,* was an agreement separate from the charter party. Under such circumstances, the Court's error is manifest and the Order directing NATIONAL to proceed to arbitration should be vacated and the petition dismissed.

POINT IV

The Court below committed prejudicial evidentiary errors requiring reversal.

A. ***The Court erred in preventing the full and proper cross examination of DeSalvo and in overlooking material admissions on his part.***

The Court found the testimony of DeSalvo "consistent and perfectly credible" and supported by his contemporaneous notes[10] (App. 51). We do not challange the Court's prerogatives with regard to matters affecting credibility, but we do submit the Court had no license to wholly overlook material admissions or to conclude DeSalvo's testimony was consistent, if in fact it was not.

On the totality of the admissible evidence it is difficult to avoid the conclusion that DeSalvo, in his perhaps understandable eagerness to earn a substantial commission (Tr. 83), was vastly premature and self-serving in characterizing the telexes of March 17 as a "fixture". DeSalvo could not validly bind HELLENIC or NATIONAL simply on his own fiat, for he agreed and admitted that he was nothing more than a go-between and was not acting as an agent for any party (Tr. 151-154), that calling the telex of March 17 a "fixture" was "probably my word" not that of Theodoracopulos—that "calling it a fixture telex maybe is not proper verbiage from your standpoint . . . " (Tr. 118).

The court makes it plain that it drew inferences adverse to HELLENIC from what it found to be the fact that upon receipt of the alleged fixture telex on March 17 "neither

---

[10] It is questionable how much of the witnesses' demeanor is still fresh in the mind of a Court whose findings were written nearly nine months after the hearings.

H.T. nor Spears called or telexed Poten and Partners back, commenting on or correcting the fixture telex" (App. 43). Theodoracopulos, however, did place a call to Poten that same evening but got no answer (Tr. 218, 220). He did reach DeSalvo, however, the next morning and "expressed to him my great surprise why he had sent this Telex over" (Tr. 218). Theodoracopulos told DeSalvo that he had been presumptuous in sending out the purported "fixture" telex, and that the telex " . . . had a lot of inaccuracies in it and we had still to discuss all other matters of the charter party," that the parties were "subject to details [and] all of the rest of the terms to be discussed", that HELLENIC was not a subsidiary of NATIONAL. Theodoracopulos further advised DeSalvo that he did not understand the deletions in the "Mobiltime" form and that he wanted DeSalvo to prepare a *pro forma* of the charter party and to send it over along with what INTEROCEAN wanted in the form of a guarantee so that Theodoracopulos could review them (Tr. 218, 220).

We submit it is highly significant that DeSalvo denies none of this. He admits a phone conversation took place early on March 18, but does not remember what was said, only that he had no recollection so far as he could recall of Theodoracopulos being angry or taking offense with him (Tr. 139-141). The significance is that on the 18th DeSalvo himself was no longer sure there was a "fixture".

To elaborate, DeSalvo also agreed and admitted that as of March 17 "the charter . . . had not been completely agreed" as drydocking, amongst other matters remained to be agreed on (Tr. 36), that the "sub-details" must be agreed upon (Tr. 109-110) and that the guarantee was an "item that would have to be agreed upon after you [DeSalvo] had passed some form of guarantee to him

[Theodoracopulos] to study" (Tr. 167). At page 178 of the trial transcript, DeSalvo answered as follows:

> "Q. The fact of the matter is, isn't it, that on Friday the 19th neither party knew exactly what they would be signing, if they were going to sign anything? A. That is correct."

The central issue in this case was crystalized during DeSalvo's cross examination (Tr. 184-85):

> "Q. Isn't the sense of what you were saying that 'The fixture Telex does incorporate those matters which have been agreed upon'? A. That is correct.
>
> The Court: That it doesn't necessarily purport to include all of the terms of the deal as it might be worked out?
>
> A. I don't know what you mean by that, but *all the terms that were discussed in the offers and the counter-offers, what my understanding of the final confirmation of those terms was I put in the Telex. If there was something that one of them didn't agree with, then they could say so.*
>
> Q. *That is right. If there was something that they didn't agree with in your fixture Telex then they weren't bound by it, were they?* A. *No, I don't—*
>
> Q. *You don't claim, do you, as a broker negotiating on behalf of two parties that because you put out a fixture letter or what you choose to call a fixture letter that necessarily binds both of those parties, do you?*
>
> The Court: *Objection sustained.*
>
> Mr. Gilchrist: *That is the heart of this case, your Honor.*
>
> The Court: I don't like argument when I make a ruling. I think that is a question for me to determine, not this witness.
>
> Mr. Gilchrist: I think it is material to know what the witness thinks.

The Court: I don't want argument on questions when I rule on evidence.

* * *

The Court: I don't like to interfere with counsel in his cross examination unduly but this witness is not to decide questions of law. I am.

Mr. Gilchrist: It is what his own understanding was.

The Court: Please. Next question." (Tr. 184-85) (emphasis added).

From his own point of vantage as a broker eager to earn a commission, DeSalvo conceded two crucial points, 1) that his purported "fixture" telex of March 17 was simply *his* understanding of those terms of the negotiations which the parties had *agreed upon;* and 2) that the so-called "fixture telex" did not purport to cover anything more than what, supposedly, had been agreed on, that is to say it did not include terms, whether "essential" or otherwise, which had not been either discussed or agreed. *What is equally important, however, is his concession that his purported "fixture" telex did not as a matter of his own understanding bind either party.*

At Tr. 42 the court allowed DeSalvo to offer his opinion as to whether the drydocking clause was an "essential part" of the purported charter. At Tr. 90 the Court observed that DeSalvo "has testified as an expert as well". Yet, at Tr. 136, the Court would not permit DeSalvo to answer this question, put to him on cross-examination: "Q. So you have to agree that the negotiations were not concluded on Wednesday [March 17th]; is that correct?" At Tr. 170-171 the Court refused to allow DeSalvo to answer the question "Would you agree . . . that an appropriate letter of guarantee was an essential term of this business?" And at Tr. 172 the Court cut off any

answer to the question "How could you have a completed transaction without the execution of some form of guarantee?" Respondents respectfully submit that reversible error was committed in the unwarranted restriction of counsel's proper cross examination in the four crucial instances cited above: at Tr. 185, 136, 170-171 and 172.

B. ***The Court erred in making findings on matters dehors the record.***

One of the most egregious errors committed below, was in the findings respecting an alleged decline in the market during the negotiations and that the "fixture" was "published" (App. 50).

Neither of these findings rest upon any evidence in the record. The only source for the finding on the asserted drastic fall in the market between March 17 and 24th is a statement to that effect made by petitioner's counsel in its Trial Memorandum to the Court. The only source for the "publication" of the fixture was an affidavit of petitioner's counsel dated November 5, 1971 (Document 12) in which it was averred that "I have been advised that this was not reported by owners" and the inference drawn that it must therefore have been reported by the respondents leading to the further inference that respondents' state of mind was that a "fixture" had been made. The fact that even the petitioner recognized such matters were not in evidence was borne out by its failure to mention either point as a proposed finding.

That both of these supposed facts however, carried weight with the Court is evident from its opinion and in particular the Court's statement that "Respondent did not explain how the information of the fixture came to be reported." (App. 50) It somewhat resembles a tale by

Kafka to learn that one has a burden to adduce evidence as to matters of which there was no direct testimony from the plaintiff and no evidence in the record whatever. Not only is this most flagrant error, it was obviously quite prejudicial and these errors, standing alone, are compelling grounds for reversal.

C. *The Court's treatment of the facts, is replete with material mistakes, errors and omissions.*

a) While at App. 38, 50, 54 the Court found that the broker "was the agent for both parties" the broker at trial denied that he had either the actual or apparent authority to act as an agent for any party (Tr. 151-2).

b) The exclusions of paragraphs 9, 12A, 12B, 12BII, 12BIII in proposed "Mobiltime" form of charter party mentioned at App. 41 were suggested by DeSalvo not Theodoracopulos and DeSalvo so testified (Tr. 115).

c) At App. 51, the words "you are confirmed", were not those of Theodoracopulos but of DeSalvo himself (Tr. 28, 119. Theodoracopulos denied any "confirmation" on March 17 (Tr. 218, 220).

d) While at App. 42, 51 the Court purports to rely on testimony of DeSalvo that Theodoracopulos' stated an "appropriate guarantee would be given", DeSalvo's actual testimony was that Theodoracopulos said "appropriate guarantees *could* be given" subject to review of what INTEROCEAN had in mind (Tr. 30).

e) At App. 43, the Court states that "neither H. T. [Theodoracopulos] nor Spears called nor telexed Poten & Partners back commenting on or correcting the fixture telex." The telex was not received at NATIONAL'S offices

until after 5:30 P.M. Efforts to call Poten were unsuccessful until the next morning.

f) At App. 45 while the Court finds that trading in the "fixture" telex was limited to non-communist controlled countries, the "fixture" telex excluded trade only to four countries and not all Communist controlled countries and this was a point which remained to be agreed upon by the parties (Tr. 227; App. 61, 63).

g) The Court's finding at App. 55 that Theodoracopulos never made any comment as to the dry-dock clause is patently erroneous (Tr. 221, 223, 228; App. 61).

h) The Court's treatment at App. 46 of Spears' phone message of 9:00 A.M. on March 24 contains a very material omission, namely, that respondents withdrew from negotiations at that time (Tr. 265).

CONCLUSION

The findings and conclusions of the Court below are clearly erroneous as a matter of law and the Order directing respondents to arbitrate was improperly granted and should be set aside in its entirety.

Respectfully submitted,

HILL, BETTS & NASH
Attorneys for Respondents-Appellants

ELI ELLIS
DAVID I. GILCHRIST
MARK M. JAFFE
Of Counsel

HILL, BETTS & NASH

ONE WORLD TRADE CENTER
SUITE 5215
NEW YORK, N.Y. 10048

TEL. (212) 466-4900

GEORGE YAMAOKA
EDWIN LONGCOPE
ELI ELLIS
JOHN F. LANG
ROBERT S. BLANC
BENJAMIN E. HALLER
DAVID C. WOOD
ROBERT H. PETERSON
DAVID I. GILCHRIST
ROBERT W. MULLEN
ALLAN J. BERDON
MARLENE D. DANIELS
EDWARD H. DUGGAN, JR.
MARK M. JAFFE

CHARLES B. HILL (1868-1959)
GEORGE W. BETTS, JR. (1871-1959)
J. NEWTON NASH (1899-1959)

WASHINGTON
1701 PENNSYLVANIA AVENUE
WASHINGTON, D.C. 20006
TEL. 202-298-7133
WILLIAM R. JOYCE, JR.
RESIDENT COUNSEL

TOKYO
YAMAOKA & YOSHIMOTO
NO 1-1, 2 CHOME
SHIMBASHI, MINATO KU
TOKYO, JAPAN

TELEX: NEW YORK 222144
TOKYO J24525
ALL CABLES: HILLBETTS

August 5, 1974

Hon. A. Daniel Fusaro, Clerk
United States Court of Appeals
Second Circuit
United States Courthouse
Foley Square
New York, N. Y. 10007

Re: Interocean Shipping Company
v. National Shipping and Trading
Corporation and Hellenic
International Shipping S. A.
Docket No. 74-1713
Our File No. 2034-5

Dear Sir:

Pursuant to a telephone conversation between the undersigned and Nathaniel Fensterstock, Esq., Staff Counsel, we are filing herewith Respondents-Appellants' Brief of 73 pages. Also being filed is the joint Appendix in two parts.

Motion was made on July 24, 1974 for leave to file an oversize brief. In order to meet scheduling order requirements, would you please clear the acceptance of the oversize brief with Staff Counsel.

Very truly yours,

HILL, BETTS & NASH

By: Mark M. Jaffe

MMJ:gs
Enclosure

cc: Nathaniel Fensterstock, Esq.